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INTERSTATE COMMERCE COMMISSION REPORTS

VOLUME 358

DECISIONS OF THE
INTERSTATE COMMERCE COMMISSION
OF THE UNITED STATES

AUGUST 1978-NOVEMBER 1978
(A number of older cases included)

REPORTED BY THE COMMISSION

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I

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INTERSTATE COMMERCE COMMISSION REPORTS

No. 36418

HOERNER WALDORF CORPORATION v. UNION PACIFIC RAILROAD COMPANY, ET AL.

Decision and Order

An appeal from an initial decision by Review Board Number 4 was filed by complainant Hoerner Waldorf Corporation on August 2, 1977, to which defendants replied.[1] In addition to the appeal, complainant also (1) moves to strike material from defendants' reply, (2) again petitions to reopen the record to submit additional evidence, and (3) requests oral hearing. The appeal does not warrant a different result than that in the prior report. While the petition to reopen is granted, the motion to strike and the request for oral argument are denied. Arguments and requested findings not specifically discussed have been considered and found not justified or their resolution not necessary for the proper disposition of this proceeding.

By complaint filed August 13, 1976, Hoerner Waldorf Corporation, a pulpboard producer located in Schilling, Mont., assailed certain rail rates from its producing point to destinations in Southern California as unjust and unreasonable in violation of section 1 and unduly preferential and prejudicial in violation of section 3. In the initial decision, Review Board No. 4 found that the rates were not shown to be unjust and unreasonable, unduly prejudicial to complainant and preferential to its competitors and dismissed the complaint June 29, 1977.

Complainant alleges that Review Board No. 4 committed four material errors in not finding that (1) Schilling, Mont., and the pulpboard mills in Washington, Oregon, and Idaho are not in different territories, (2) complainant has suffered injury from the assailed rate disparity, (3) transportation conditions affecting Schilling and the compared points are not different, and (4) complainant's evidence establishing unreasonable rates and ratemaking procedure is probative.

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[1] Sixty-two railroads, either participating directly in the involved movements or by through routes and joint rates, were joined as defendants in this proceeding. As a practical matter, complainant designates six class I railroads in region VI as actually controlling the rates in question. These railroads are: Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Burlington Northern, Inc.; Union Pacific Railroad Company; Southern Pacific Transportation Company; The Western Pacific Railroad Company; and, The Atchison, Topeka and Santa Fe Railway Company.

Complainant's various motions and requests will be addressed first. Complainant moves to strike the following material from page 8 of defendants' reply:

> In the space of three years Hoerner Waldorf moved from approximately 7/10ths of 1% of the California market to almost 5% of the California market at the expense of its allegedly perferred competitors.

It contends that this material should be stricken because there is no reference to the record and no evidence of record to support the statement. Complainant also contests the stated percentages.

Defendants reply that in context the statement is clear that the percentages refer to the California rail market. They contend that the figures are correct and of probative value.

It is clear to us upon reading defendants' pleading that they are referring to the California rail market. Pursuant to rule 2 of the General Rules of Practice, the Commission has traditionally adopted a liberal stance on the admission of evidence. The sentence in question is not overly vague, and in the absence of supporting data may be treated as mere argument. The motion to strike is denied.

Complainant also petitions to reopen the proceeding to receive newly discovered evidence. The proffered evidence was discovered after the hearing and complainant exercised reasonable diligence in bringing it to our attention. The evidence is alleged to prove that the Union Pacific Railway Company is the ratemaking route. Sufficient cause being shown, the petition is granted. Nevertheless, this evidence does not warrant a different result. The evidence is directed at a general roll-back in rates on the subject commodity within mountain Pacific territory. Complainant seeks to characterize this action as an acquisence in the Union Pacific Railroad Company's power to set the general level of rates in the territory. However, the roll-back was a response to similar actions by railroads throughout the continent. The carriers east of the Rocky Mountains initially rolled back the increases including those applicable on movements to the west coast. The Union Pacific then took independent action as a defensive measure. At that time, however, the other carriers did not feel this roll-back was necessary on movements from the Northwest to California. They later discovered after complaints from Northwest shippers that defensive action on their part would also be necessary and they too rolled back the increase.

Complainant also requests an oral hearing. Pursuant to rule 93 of the General Rules of Practice, oral argument is granted at the discretion of the Commission or its division. As all relevant facts and arguments are adequately set forth in submitted pleadings, it is unnecessary to hear the same reiterated orally. Such a hearing, moreover, would only delay the proceeding. The request is denied.

After a thorough review of the entire record, the complaint, petitions, appeals, and replies filed in this proceeding, we find that the appeal does not warrant a different result than that in the prior report. The record clearly establishes that the assailed rates are primarily due to Hoerner Waldorf's location, it being at an advantage compared to some of its competitiors when shipping to some points and at a disadvantage when shipping to others. We also find that it is unnecessary to make a determination as to whether or not Hoerner Woldorf suffers an injury as defendants have demonstrated more than adequately that the difference in rates is justified by different transportation conditions. Moreover, complainant's insistence that water competition does not exist in the Pacific Northcoast territory is unfounded. There is substantial evidence of water competition not only in this proceeding but in Ex Parte No. 270 (Sub. No. 8), *Investigation of the Railroad Freight Rate Structure*, 345 I.C.C. 2092 (1977), wherein complainant's own witnesses supplied evidence of water competition in that territory. Complainant's suggestion that the entire rate structure in the Pacific Northcoast territory be revised is not supported by the evidence. Additionally, our investigation in Ex Parte No. 270 (Sub-No. 8), *supra*, indicated that revision of that rate structure is both undesirable and unnecessary.

We find that the evidence considered in the light of the specification of errors in complainant's appeal and reply thereto does not warrant a result different from that reached by Review Board No. 4; and that, except as modified, its statement of facts, conclusions, and findings, being correct and proper in all material respects are affirmed and adopted as our own.

It is ordered:

In adopting the review board's initial decision as our own the following changes are made:

1. On page 6, line 38 replace "the" with "another," and after "tariff" insert "Schilling is located approximately 200 miles east of this group near Missoula, Mont."

2. On page 14, line 21 after "traffic." insert "These groupings are deemed especially necessary in that territory."

3. On page 14, line 27 after "311." insert "Further even if there is an injury, the differing rates may be justified by differing transportation conditions."

4. On page 15, line 25 after "273" insert "In the *Kress* case the Commisson said: "Comparisons of revenue produced by individual rates for specific distances are of little, if any probative value in considering a rate structure comprising extensive origin and destination groups."

5. On page 15, line 25 after "particleboard," insert "instituted for the purpose of generating traffic rather than demonstrating that it is in the same group as the other points in question,"

6. On page 16, line 12 delete the period and insert "on the Union Pacific over the Ogden gateway. To destinations in central and northern California and to destinations in southern California not served by the Union Pacific, short-tariff miles from Schilling and the Wallula-Lewiston group would be constructed over the Portland gateway. Thus, the short-tariff miles to these points would be greater from Schilling than from Northcoast groups."

7. On page 16, line 33 after "unreasonable." insert "Moreover an examination of the various rates reveals that the rate differential between Schilling and other points appear to be within the zone of reasonableness when compared to complainant's competitors."

8. On page 17, line 12 and 13 delete "However, complainant has not shown that it suffers any injury from these rate differences." and insert "We need not reach a conclusion as to whether injury has been shown because defendants have demonstrated that the differences in rates are justified by differing transportation considerations."

Decided November 23, 1977.

The statement of facts, conclusions, and finding of Review Board Number 4 Fitzpatrick, Shaw, and Fisher follows:

Point-to-point commodity rates on pulpboard from Schilling, Mont., to California destinations found not shown to be unjust and unreasonable, unduly prejudicial to complainant and preferential to Pacific Northcoast pulpboard producers, or otherwise unlawful. Complaint dismissed.

Arthur A. Arsham, William Q. Keenan, William H. Kreckman, and *Frederick A. Muth, Jr.,* for complainant.

Cyril A. Sprengelmeyer for defendants.

Edward F. Fetzer, William F. Kowalski, Norman Langberg, and *Ivan A. Olson* for interveners.[2]

The modified procedure has been followed. Pursuant to section 17(9)(b) of the Interstate Commerce Act the proceeding has been assigned to this board for initial disposition. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necesssary for the proper disposition of this proceeding.

By complaint filed August 13, 1976, as amended, Hoerner Waldorf Corporation (complainant) alleges that rates published by defendant railroads[3] on pulpboard moving from its mill located at Schilling, Mont., to points in California are unjut and unreasonable, and constitute an unreasonable practice in the method and manner of their establishment in violation of section 1, and are unduly prejudicial to complainant and preferential of Pacific Northcoast pulpboard producers[4] in violation of section 3 of the act. Complainant requests that the Commission order defendants to cease and desist from the aforementioned violations and direct them to establish and apply in the future, rates prescribed by one of the following alternative methods:

1. Prescription of a fixed relationship in the rates from the Northwest pulpboard producing region by grouping at the same level, carload rates on pulpboard from Schilling with the carload rates on pulpboard from Wallula, Millwood, Bellingham, and Tacoma, Wash., and Lewiston, Idaho, to all points in California; or
2. Prescription of a mileage scale to apply from all shipping origins in the four producing States on carload movements of pulpboard to California employing the structure of alternating minimum weights applicable to pulp and paper shipments.[5]

The amended complaint, filed pursuant to a Commission order dated October 29, 1976, addresses the issue of market dominance. The language of new section 15(9) of the act indicates that market dominance will not be an issue except in proceedings initiated following promulgation of the market dominance standards. Moreover, in view of our ultimate findings, the evidence presented on this issue need not be discussed.

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[2] Petitions to intervene in opposition to the relief sought by complainant were filed by Longview Fibre Company, Georgia-Pacific Corporation, International Paper Company, and Menasha Corporation. These petitions were granted by orders of the Commission entered on January 13, 1977, and February 23, 1977. A petition filed by Weyerhaeuser Company was not granted since this party failed to identify its interest.

[3] See footnote 1.

[4] These manufacturers are located at points in Washington, Oregon, and Idaho, and allegedly compete with complainant for the sale of pulpboard to markets in California.

[5] The prescribing order, based upon either formula, is to be of continuing effect requiring maintenance of the prescribed rate relationship, subject to general increases applied uniformly to such movements.

PROCEDURAL MATTERS

In a petition filed March 11, 1977, complainant seeks reopening of the record for the receipt of "newly discovered evidence" under rule 102 of the Commission's General Rules of Practice (49 CFR 1100.102). The evidence consists of new rate levels published by defendant Union Pacific on pulpboard from Pacific Northwest producing points to some California points, effective February 20, 1977. These rates were published after the record was closed in this proceeding, and allegedly changed the rate relationships assailed by lowering the rates to some of complainant's competitors.

A petition for reopening is addressed to the Commission's discretion. See *Illinois Central Railroad Company* v. *United States*, 263 F. Supp. 421, 431 (N.D. Ill. 1966) affirmed, *per curiam*, 385 U.S. 457. The evidence sought to be introduced into the record is in the nature of tariff supplements containing changed rates applicable to the traffic of some of complainant's alleged competitors. Also submitted is a supplementary statement of facts and argument analyzing the effect of these changes on the rate relationships at issue in this proceeding.

The evidence sought to be introduced merely supplements the original schedules which are a part of the record. It is cumulative in nature and would add nothing to our resolution of the issues. Reopening for consideration of schedules filed some 3 months after the close of this record also would delay unduly determination of this proceeding. Therefore, complainant's petition to reopen this proceeding is denied.

BACKGROUND

The Pacific Northwest region of the United States is a highly concentrated pulp and paper production area. Complainant operates a mill located at Schilling, Mont., and allegedly competes with manufacturers of pulpboard in the Pacific Northcoast States of Washington, Oregon, and Idaho, for the sale of this commodity to markets in California. Defendant railroads publish commodity rates on pulpboard from these producing origins to destinations in California by grouping the origin points and applying the same rates within each group on movements to the various California destinations. Wallula, Millwood, Bellingham, Port Townsend, and Sumner, Wash., and Lewiston, Idaho, comprise one such origin group. Schilling, Mont., is not a part of an origin group and appears as a single point publication in the tariff. The rate levels for the Wallula-Lewiston origin group are lower than from the nongrouped origin at Schilling.

COMPLAINANT'S EVIDENCE AND ARGUMENT

Complainant submitted a formal complaint and an opening statement of facts and argument in support of its position. Complainant basically relies upon rate comparisons and cost evidence to establish the alleged violations of the act.

The rate comparisons submitted by compliainant are reproduced in appendix A. According to complainant, these comparisons illustrate that in every instance cited, the rate from Schilling is higher than the rate applicable to the same destination from any of the Northcoast points. As part of the rate comparison data, complainant computed mileages from Northcoast points to California and correlated the relationship between the rates and mileage figures. Complainant's computations were based upon route and distance figures between junction points published in individual railroad tariffs. From these figures short and long tariff route miles from Northcoast origins to California destinations were obtained. The short tariff miles were constructed via the Silver Bow route from Schilling to points in southern California. It is the short tariff route mileages that complainant relies upon as justification that, on a comparative basis, the rates from Schilling are unjust and unreasonable and unduly prejudicial to complainant and preferential of its competitors.

It is complainant's contention that the rates applicable from the Wallula-Lewiston basing group produce lower revenues for defendant railroads on a per ton-mile basis than from Schilling to the same California destinations. In support of this allegation, complainant developed cost data showing the variable costs of handling the movements between the involved origin and destination points. Movements from Schilling to 17 California destinations to which complainant made rail shipments from August 1975, to July 1976, were costed. For costing purposes minimum lading weights of 90,000, 120,000, and 140,000 pounds were utilized. In addition, costs were computed on the basis of both long and short tariff route mileages. The source of the data used to construct the costs is Statement No. ICI-74, "Rail Carload Cost Scales 1974." The actual costs used were those developed for unequipped general purpose boxcars. These 1974 costs were updated to the January 1, 1976, level by a ratio of 1.096 which was developed using procedures outlined in Statement No. 2-58, "Rail Carload Cost Scales by Territories as of January 1, 1958." A comparison of complainant's costs developed for both short-haul and long-haul mileages, with the applicable revenues (at the Ex Parte No. 313 level, from complainant's proposed mileage rate scale, and including Schilling in the Wallula-Lewiston group), for each of the 17 movements is reproduced in appendix B. Each of the movements deplicted were weighted by the ton-miles of haul for each of the three weights costed.

The results of the cost analysis are summarized in the following tables:

TABLE I

Ratios of existing revenue to variable costs[1]

Rate scale (1)	Ratio revenue to variable cost Short haul (2)	Ratio revenue to variable cost Long haul (3)
Pounds		
90,000	1.83	1.56
120,000	2.07	1.76
140,000	2.16	1.83
Composite	2.03	1.72

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[1] In view of the fact that the cost data is based upon hypothetical movements, complainant obtained a 20-percent random sample of its actual traffic moving between August 1975, and July 1976, and found that this reduced the composite ratio of rail revenues to variable costs from 2.03 for the hypothetical single movements at the tariff minimum weights, to 1.93 which actually took place via short tariff miles.

Table II

Estimated ratios of revenue to variable costs resulting from proposed mileage rate scale

Rate scale (1)	Ratio: Proposed mileage scale revenues to variable cost Short haul (2)	 Long haul (3)
Pounds		
90,000	1.64	1.40
120,000	1.87	1.59
140,000	1.96	1.67
Composite	1.83	1.56

Table III

Estimated ratios of revenue to variable costs resulting from inclusion of Schilling in Wallula-Lewiston origin rate group

Rate scale (1)	Ratio: Wallula-Lewiston rate group revenues, including Schilling, to variable cost Short haul (2)	 Long haul (3)
Pounds		
90,000	1.61	1.37
120,000	1.82	1.54
140,000	1.65	1.40
Composite	1.69	1.44

In its argument, complainant alludes to the geographic proximity of Schilling to the Wallula-Lewiston origin group as evidence that Schilling merits inclusion within the group for rate basing purposes. The short tariff route mileage figures and the fact that the distance from Schilling to the nearest point within the group is less than some distances already existing between points within the group, are also asserted to be persuasive factors. Other arguments advanced are that including Schilling within the group will not enlarge its boundaries unnecessarily and will not distort producing origin relationships to any great degree.

Complainant cites as precedent for granting the requested relief, rate bureau action which approved the inclusion of Missoula, Mont., within the Pacific Northcoast rate basing group for the movement of particleboard to southern markets. The relative merits of the group basing system are also considered by complainant. The requirements for section 3(1) relief are set out and dissolution of the group system and introduction of a mileage scale is offered as an alternative to satisfy the condition that section 3(1) orders provide a viable option to the carriers in abating discrimination. Distance, it is argued, has been held by the Commission to be the best measure of transportation service and, thus, a system based on mileages would be preferable to one that inherently discriminates against borderline locations.

DEFENDANTS' EVIDENCE AND ARGUMENT

In reply, defendants submit that Schilling is located well east of the Pacific Northcoast pulpboard producing points and is in Montana which has by traditional ratemaking practices taken higher rates to California than either Idaho or Washington. Defendants show that conversely, Montana has taken lower rates than Washington or Idaho origins on shipments to the central States, which complainant acknowledged, constitutes its largest market. Thus, if complainant's argument is accepted, defendants contend that the grouping would have to apply as well to eastbound shipments. Defendants' evidence consists of corrected statements of the rate and mileage data submitted by complainant and a statement showing inaccuracies in complainant's cost evidence.

Defendants provide a detailed description of the development of the rate structure between the Pacific Northwest and California. This historical overview emphasizes that Portland was originally the only gateway over which shipments moved. As a result, it was the gateway used as a basis in establishing rates and the Southern Pacific route over Portland became the established ratemaking route. Thus, because of the dominance of the Southern Pacific route, distances are taken into consideration only as they relate to Portland from the production point.

Due to the coastal location of this area, many of the rates were originally established to meet water competition and these rate relationships have been maintained in view of the potential threat of diversion. The rates on pulpboard follow the same pattern as general commodity rates, that is, the rates north or east beyond Portland are graduated over Portland in a manner which takes into consideration the additional distance involved. Thus, the rates and origin groups on pulpboard between the Pacific Northwest and California have been influenced primarily by intermodal competition, market competition and the shipper's distance from Portland.

Defendants note that the initial publication of complainant's rate at Schilling provided for routing via the Portland gateway. Routing via Butte and Silver Bow was added after publication of the original rate structure. According to records maintained by the railroads, the Butte-Silver Bow routing was not utilized until February 1976, and this gateway has never been considered the ratemaking route.

In response to other allegations of complainant, defendants distinguish the rate on particleboard moving from Missoula, to southern destinations, from the instant proceeding. First, defendants argue that pulpboard and particleboard do not compete and have entirely different end uses. The commodities exhibit different transportation characteristics, in the areas of loading and the type of rail equipment utilized. Furthermore, although proponents of the particleboard rates from Missoula sought rates to Los Angeles on the same level as those existing from Baum, Oreg., they were only granted rates 8 cents higher than the existing rate from Baum. (This differential has increased to 10 cents at both minimum weights of 115,000 pounds and 140,000 pounds.) The purpose behind the Missoula rate adjustment, was explained by the rail carriers as an attempt to secure entry of Missoula particleboard producers in the southern California particleboard market. However, this lower rate has not succeeded in generating traffic and is characterized by defendants as a "paper rate." Thus, the particleboard situation can be distinguished if for no other reason than that complaint, by its own admission, has been a viable competitor in the California market for some time.

The corrections made by defendants to complainant's mileage figures appear in appendix C. Basically, the errors consist of mileages not being constructed over the shortest route and mathematical miscalculations.

Defendants do not submit a cost study in support of their position, since they maintain that costs have no significance in this proceeding. However, they do point out discrepancies in the complaint's cost analysis and present a restatement of complainant's costs in rebuttal.

Defendants state that in development of complainant's costs, the terminal costs and the cost per car-mile have all been increased to the January 1976 level using an update ratio of 109.6 percent. However, defendants contend that complainant failed to update the way and through train costs per ton-mile. This assertedly results in an understatement of costs at the January 1976 level.

Defendants also believe that the index used to update complainant's costs is inappropriate. First, they point out that the rates presently in effect are shown to be at the Ex Parte No. 313 level. Thus, a proper level of expenses for the carriers to compare with the Ex Parte No. 313 rate level would have been October 1, 1975. This was the final date for increases in expenses utilized to justify Ex Parte No. 313 general rate increases by the Nation's carriers. It is further alleged that the index computed by complainant is understated. Using the Commission's Statement No. 2-58, *supra*, procedures for developing update factors, defendants arrived at a ratio of 113.42 percent for adjusting the 1974 level of expenses to the October 1975 level.

Finally, defendants take exception to complainant's method of developing interchange costs. Defendants note that complaint elected to determine these costs on a per loaded car-mile basis. However, they contend that if the number of actual interchanges are known, as is the case here, this cost should be developed on a per actual car basis.

In view of the apparent discrepancies in complainant's cost analysis, defendants attempted to correctly estimate the costs to the railroads for the subject traffic. In this regard, defendants restated complainant's costs using complainant's traffic factors, miles of haul, weights of lading, routes of movement, et cetra, as well as complainant's cost input factors.

Defendants, in addition to revising the interchange costs and the way and through train costs, indexed the costs to the October 1, 1975 level using their index factor of 113.42 percent. Comparisons of defendants' restated costs with the revenues per car for the 17 movements are contained in appendix D. Defendants note that both their own costs and complainant's costs are at the variable level of expense. Consequently, it is argued that if the fully allocated cost level were considered, the profit margin to the carriers would be much smaller, if not completely eradicated on some of the sample movements.

The following table is a comparison between the present revenue to variable cost ratios computed by complainant and by defendants.

TABLE IV

Rate scale	Ratio: Revenue to variable cost			
	Complainant		Defendants	
(1)	Short haul (2)	Long haul (3)	Short haul (4)	Long haul (5)
Pounds				
90,000	1.83	1.56	1.63	1.39
120,000	2.07	1.76	1.84	1.57
140,000	2.16	1.83	1.92	1.63
Composite	2.03	1.72	1.80	1.54

Also following is a comparison of the ratio's of revenues resulting from complainant's proposed mileage scale rates to the variable costs as computed by complainant and defendants.

Rate scale	Ratio: Proposed mileage scale revenues to variable costs as computed by			
	Complainant		Defendants	
(1)	Short haul (2)	Long haul (3)	Short haul (4)	Long haul (5)
Pounds				
90,000	1.64	1.40	1.46	1.25
120,000	1.87	1.59	1.66	1.41
140,000	1.96	1.67	1.74	1.48
Composite	1.83	1.56	1.63	1.39

Defendants note that complainant's proposed mileage scale of rates was designed to produce revenue in excess of 160 percent of variable costs. However, as can be seen above, a comparison of these proposed rates with the restated costs indicates that none of the long-haul comparisons meets this 160-percent criteria.

Finally, defendants reiterate their belief that the costs of service are irrelevant in this proceeding. Defendants contend they would not have included a cost statement had it not been for the fact that complainant's cost evidence contained errors. Defendants also contend that it should not be inferred that their cost presentation represents restatement of the actual costs. The reason for this is that defendants accepted, without verification, the mileages used by complainant, which were subsequently found to be in error. Thus, the defendants' costs show the relative impact of the errors made by complainant, except where mileages were checked and found to be correct. Defendants state that accurate costs are not of record.

COMPLAINANT'S REBUTTAL

Complainant submitted a statement in reply to defendants, in which it makes various corrections in its initial computations in light of defendants' reply statement. The following table represents a summary comparison of the ratios of present rates, proposed mileage scale rates, and rates resulting from inclusion of Schilling in the Wallula-Lewiston origin rate group, to the variable costs as restated by complainant.

TABLE V

Rate scale (1)	Ratio: Revenue to variable costs as restated by complainant Short haul (2)	 Long haul (3)
Pounds	*Present rates*	
90,000	1.70	1.42
120,000	1.93	1.60
140,000	2.01	1.67
Composite	1.89	1.57
	Proposed mileage scale rates	
90,000	1.52	1.27
120,000	1.72	1.44
140,000	1.81	1.51
Composite	1.69	1.41
	Wallula-Lewiston rate group rates	
90,000	1.53	1.29
120,000	1.72	1.44
140,000	1.71	1.43
Composite	1.66	1.39

Complainant's rebuttal argument is directed primarily to defendants' allegations that water competition is the basis for the rate structure in the Pacific Northcoast region and is an important factor in maintenance of existing rate relationships in the area. Complaint argues that water competition has not been established and that even if it once was a factor in the establishment of the rate structure, it has long since ceased being a potential threat to rail movements in the coastal area. Although geographically there is the potential for diversion to water transportation "[t]he intercoastal movement by which the rate disparity is sought to be justified is based on a phantom fleet operating to non-existent terminals at illustory costs," citing *Saskatchewan* v. *United States*, 253 F. Supp. 504 (W.D. Wash. 1965).

DISCUSSION AND CONCLUSIONS

A complicated situation exists along the border between any two rate territories. All territorial dividing lines are more or less arbitrary, and such lines generally have the appearance of injustice to some point or points across the line. See *Southern Class Rate Investigation*, 128 I.C.C. 567, 585; *Coleman Co., Inc.* v. *Akron, C. & Y. R. Co.*, 281 I.C.C. 777, 784; *Mount Vernon, Ind., Cham. of Com.* v. *Abilene & S. Ry. Co.*, 302 I.C.C. 549, 557. The practice of grouping points of origin or destination and applying the same rate to all points within the group is a longstanding characteristic of the rate structure of the country. *Commodity Rates on Lumber and Other Forest Products*, 165 I.C.C. 561, 565. This is particularly true in the Pacific Northcoast territory which is sparsely populated with a basic imbalance of returning northbound traffic. Rate groups cannot be extended indefinitely and the discrimination inherent in all group adjustments must not be undue. Groups long maintained, however, are presumably fair and are not to be disrupted unless substantial justice clearly requires it. Dissatisfied producers deprived of the benefit of their proximity to common markets must show that they are actually injured and by an unjust and unlawful discrimination. *Galloway Coal Co.* v. *Alabama G. S. R. Co.*, 40 I.C.C. 311. The sought mileage scale is not a viable alternative for the Pacific Northcoast territory. This is true not only because producing points are so distant from each other, but because of the potential for diversion which is greatest for the extreme northern points. Under a mileage scale, these points would take the highest rates on southbound movements. Potential water competition as a factor in the rate structure of the Pacific Northcoast territory was an area of dispute between the parties. Complainant maintained and cited authority for the proposition that that water competition is not realistically a threat in the Pacific Northcoast territory. One case relied upon extensively by complainant was *Saskatchewan* v. *United States, supra*. However, on remand, *Saskatchewan Minerals* v. *Chicago, M., St. P. & P. R. Co.*, 335 I.C.C. 8, actual water competition was found to exist. Certainly based upon geographic location, the Pacific Northcoast territory is in closer proximity to water than Schilling, which brings us to the decisive factor in this case. Schilling is located not only outside the group basing points, but in another territory altogether. Montana has consistently taken different rates than points in the States included in the Wallula-Lewiston origin group. To disrupt established territorial limits and relationships based upon this record would require a complete revision of the longstanding rate structure of the Pacific Northwest territory, which we do not feel is warranted.

The specific violations of the act alleged by complainant are the unreasonableness of the present rates, the unreasonableness in the method and manner of their establishment and preference and prejudice between complainant and its competitors. As noted above, this record will not sustain a finding that defendants' exclusion of Schilling from the Wallula-Lewiston group or failure to institute a mileage scale of rates constitutes an unreasonable practice.

An important test of reasonableness is the comparison of an assailed rate with others which represent a proper standard of comparison. *Chicago Board of Trade* v. *Illinois Central R. Co.*, 329 I.C.C. 529, 532. The Commission may not arbitrarily fashion a standard out of whole cloth. The party assailing a rate has the obligation to establish that the standard desired is rational and that it has in fact met the standard proposed. *Inspection in Transit, Grain and Grain Products*, 349 I.C.C. 89, 93. Often, in determining the reasonableness of rates on a particular kind of traffic, the most important facts of record are those pertaining to rates on like traffic in the same general territory. *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151, 164.

The rates submitted for comparison are not probative of the issue of reasonableness for the following reasons. It has been noted that Schilling is located in different territory than the origin group in which it seeks inclusion and is subject to different transportation conditions. It is well settled that rates depressed by water competitive conditions cannot serve as bases for determination of a reasonable maximum. See *Timber Engineering Co. Southwest* v. *A., T. & S. F. Ry. Co.*, 262 I.C.C. 118, 123. Furthermore, point-to-point rates do not afford a proper basis for comparison with rates constructed on the group principle. *S.H. Kress & Co.* v. *Central of Georgia R. Co.*, 274 I.C.C. 272, 273. In regard to the rate from Missoula on particleboard, comparisons with "paper rates," which move little or no traffic, are of little probative value. *State Board of Equalization of Wyo.* v. *Abilene & S. Ry. Co.*, 305 I.C.C. 497, 512. In view of the foregoing, we conclude that the rate comparisons relied upon by complainant lack probative value.

The short tariff miles computed by complainant and offered to show that movements from Schilling to California destinations are shorter than from points in the Wallula-Lewiston origin group, are also unpersuasive. The reason for this that the Silver Bow gateway was not used before February 1976, and no movements had occurred over this route for several years. The defendants proposed cancellation of this gateway effective December 31, 1976, is the subject of another proceeding. The traffic has moved for many years over the Portland gateway, Southern Pacific being the basic ratemaking carrier and short-line distances have been largely disregarded in constructing the rates. Southern Pacific does not participate in shipments over the Silver Bow route and the only connection which the Burlington Northern has is to isolated mountain points. Furthermore, the movements upon which the short tariff miles were constructed are confined to limited southern California destinations.

As to the cost data presented, complainant has made no study or showing of actual operating characteristics at any of the shipping points. Only territorial average data based on mileages over hypothetical routings were used to develop the costs. Specifically, no traffic studies or studies of switching operations at the various terminals were conducted. Minimum tariff weights were used in constructing the costs, whereas costs are related to actual lading weights. These, in addition to other factors, such as turnaround times, special services, et cetera, all have an affect on costs. In order to determine, from a cost standpoint, where the rates from one point should be comparable to those from other points, each of these factors which affect costs should be studied and computed. Only after these matters have been considered would it be possible to determine if the cost were similar or different for the handling of the subject traffic from the various origin points in question.

Both the defendants and the complainant have updated 1974 costs to the October 1975 level by different index factors. However, neither method was shown to accurately depict the costs at this level.

Differences were noted in the costs computed by defendants and complainant with respect to mileages and numbers of interchanges used. Since the costs were intended to depict hypothetical rather than actual movements it is not possible to resolve these differences. In any event, a mere showing of differences in the ratios of revenue to variable costs produced by rates from different points does not establish that particular rates aree unreasonable.

There remains the issue of the alleged section 3 violation. In order to warrant a finding of undue preference and prejudice the evidence should disclose (1) that a difference in the level of rates exists in favor of the preferred points; (2) that the difference in rates is not justified by transportation conditions; (3) that there is a carrier or group of carriers which is the common source of the rate prejudice and which effectively participates in both the prejudiced traffic and the preferred traffic;

and (4) that the prejudiced party or parties suffer actual or porential injury. The burden of proof is on the complainant to establish that the carrier's rates are subjecting them to undue preference or prejudice. The mere fact that there is, in a given instance, a preference or advantage does not of itself establish that such preference or advantage is undue or unreasonable within the meaning of the act. The law does not attempt to equalize opportunities among localities. A difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions. *United States* v. *Illinois Cent. R.R.*, 263 U.S. 515, 524. The evidence of record shows there is a difference in rates between Schilling and California points and the Wallula-Lewiston group and those points. Defendants also appear, as a group, to control these rates. However, complainant has not shown that it suffers any injury from these rate differences. Therefore, we conclude that the assailed rates are not shown to be unduly preferential or prejudicial.

ULTIMATE FINDINGS

Upon consideration of the evidence of record, we find that the assailed rates on pulpboard from Schilling, Mont., to points in California are not shown to be unjust and unreasonable, or to constitute an unreasonable practice in the method and manner of their establishment, and are not shown to be unduly prejudicial to complainant and preferential of Pacific Northcoast pulpboard producers.

And we further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

BOARD MEMBER SHAW did not participate in this proceeding.

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IT IS ORDERED, That the complaint filed in this proceeding be, and it is hereby, dismissed.

APPENDIX A

Rail rates in cents per hundredweight on pulpboard, not corrugated or indented STCC 26-311-16, at the Ex Parte No. 313 level from Pacific Northcoast origins to California

To	From: Schilling, Mont.			Wallula, Millwood, Bellingham, Port Townsend, & Sumner Wash. and Lewiston, Ind.			Tacoma, Wash.			Longview and Camas, Wash.			Gardiner & North Bend Oreg.			Albany, Toledo, Lebanon, & Springfield, Oreg.		
	90M	120M	140M	90M	120M	140M	90M	120M	140M	90M	120M	140M	90M	120M	140M	90M	120M	140M
Alameda	131	123	116	112	105	100	110	103	97	103	95	89	93	87	83	88	83	79
Anaheim	163	155	150	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Antioch	131	123	116	112	105	100	110	103	97	103	95	89	93	87	83	88	83	79
Buena Park	163	155	150	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Carson	--------	--------	--------	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Colton	163	155	150	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Compton	163	155	150	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Corona	163	155	150	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Fresno	163	155	150	123	114	[1]110	117	112	109	113	106	101	105	97	91	100	91	87
Fullerton	163	155	150	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Gilroy	--------	--------	--------	116	110	105	113	109	103	109	101	95	100	91	87	93	87	83
Los Angeles	163	155	150	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Madera	163	155	150	123	114	[1]110	117	112	109	113	106	101	105	97	91	100	91	87
Modesto	163	155	150	116	110	105	113	109	103	109	101	95	100	91	87	93	87	83
Newark	131	123	116	112	105	100	110	103	97	103	95	89	93	87	83	88	83	79
Oakland	131	123	116	112	105	100	110	103	97	103	95	89	93	87	83	88	83	79
Pomona	163	155	150	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Sacramento	131	123	116	112	105	100	110	103	97	103	95	89	93	87	83	88	83	79

See footnotes at end of table.

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Rail rates in cents per hundredweight on pulpboard, not corrugated or indented, STCC 26-311-16, at the Ex Parte No. 313 level from Pacific Northcoast origins to California—Continued

To	From																	
	Schilling, Mont.			Wallula, Millwood, Bellingham, Port Townsend, & Sumner Wash. and Lewiston, Ind.			Tacoma, Wash.			Longview and Camas, Wash.			Gardiner & North Bend Oreg.			Albany, Toledo, Lebanon, & Springfield, Oreg.		
	90M	120M	140M	90M	120M	140M	90M	120M	140M	90M	120M	140M	90M	120M	140M	90M	120M	140M
Salinas	144	136	131	128	116	[2]112	122	113	110	114	109	103	109	101	95	103	95	89
San Diego	--------	--------	--------	160	151	147	157	149	144	150	142	136	141	134	129	150	142	136
San Jose	131	123	116	112	105	100	110	103	97	103	95	89	93	87	83	88	83	79
San Leandro	131	123	116	112	105	100	110	103	97	103	95	89	93	87	83	88	83	79
Santa Fe Springs	163	155	150	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Santa Paula	--------	--------	--------	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
South Gate	163	155	150	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Stockton	131	123	116	112	105	100	110	103	97	103	95	89	93	87	83	88	83	79
Sunnyvale	131	123	116	112	105	100	110	103	97	103	95	89	93	87	83	88	83	79
Torrance	163	155	150	144	136	131	142	135	129	135	129	122	128	116	112	117	112	106
Union City	131	123	116	112	105	100	110	103	97	103	95	89	93	87	83	88	83	79
Visalia	163	155	150	129	117	113	127	115	112	116	111	105	110	101	95	[3]113	95	91

Tariff authority: Item 4100, 4110, 4120, 4130, 4140, 4150, 4160, 4170, 4180, 4190, 4370, 4390, 4450, 4460, 4490, 4500, 4530, PSFB 315-A-ICC 1974; Item 4705, PSFB 2-O-ICC 1923.

[1] There is no 140M rate from Wallula and Millwood.

[2] From Millwood the 140M rate is 111 cents.

[3] From Albany and Lebanon the 90M rate is 104 cents.

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APPENDIX B

California analysis

ORIGIN SCHILLING, MT REVENUES AND COSTS IN $ PER CAR, AND REVENUE/COST RATIOS SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) E-P 313 RATES

NO	DESTINATION NAME	REVENUES 90M	120M	140M
1	ALAMEDA	1179.	1476.	1624.
	ALAMEDA	RATIO		
2	ANAHEIM	1467.	1860.	2100.
	ANAHEIM	RATIO		
3	BUENA PARK	1467.	1860.	2100.
	BUENA PARK	RATIO		
4	CARSON	0.	0.	0.
	CARSON	RATIO		
5	COLTON	1521.	1860.	2100.
	COLTON	RATIO		
6	COMPTON	1467.	1860.	2100.
	COMPTON	RATIO		
7	CORONA	1467.	1860.	2100.
	CORONA	RATIO		
8	FRESNO	1467.	1860.	2100.
	FRESNO	RATIO		
9	FULLERTON	1467.	1860.	2100.
	FULLERTON	RATIO		
10	LOS ANGELES	1467.	1860.	2100.
	LOS ANGELES	RATIO		
11	MODESTO	1467.	1860.	2100.
	MODESTO	RATIO		
12	OAKLAND	1179.	1476.	1624.
	OAKLAND	RATIO		
13	POMONA	1467.	1860.	2100.
	POMONA	RATIO		
14	SALINAS	1296.	1632.	1834.
	SALINAS	RATIO		
15	SAN LEANDRO	1179.	1476.	1624.
	SAN LEANDRO	RATIO		
16	SANTA FE SPRS	1467.	1860.	2100.
	SANTA FE SPRS	RATIO		
17	SANTA PAULA	0.	0.	0.
	SANTA PAULA	RATIO		
18	SUNNYVALE	1179.	1476.	1624.

California analysis—Continued

ORIGIN: SCHILLING, MT. REVENUES AND COSTS IN $ PER CAR, AND REVENUE/COST RATIOS SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) E-P 313 RATES—Con.

NO	DESTINATION NAME	REVENUES 90M	120M	140M
	SUNNYVALE	RATIO		
19	UNION CITY	1179.	1476.	1624.
	UNION CITY	RATIO		
	TOTAL	RATIO		

NO	DESTINATION NAME	MILES	SHORT HAUL COSTS 90M	120M	140M	TOTAL
1	ALAMEDA	1255.	697.	775.	832.	
	ALAMEDA		1.69	1.90	1.95	1.86
2	ANAHEIM	1346.	736.	819.	879.	
	ANAHEIM		1.99	2.27	2.39	2.23
3	BUENA PARK	1633.	858.	957.	1029.	
	BUENA PARK		1.71	1.94	2.04	1.91
4	CARSON	0.	0.	0.	0.	
	CARSON		0.0	0.0	0.0	0.0
5	COLTON	1272.	704.	783.	841.	
	COLTON		2.16	2.37	2.50	2.35
6	COMPTON	1623.	853.	952.	1024.	
	COMPTON		1.72	1.95	2.05	1.92
7	CORONA	1700.	886.	989.	1064.	
	CORONA		1.66	1.88	1.97	1.85
8	FRESNO	1334.	731.	813.	873.	
	FRESNO		2.01	2.29	2.41	2.25
9	FULLERTON	1314.	722.	804.	862.	
	FULLERTON		2.03	2.31	2.43	2.27
10	LOS ANGELES	1336.	732.	814.	874.	
	LOS ANGELES		2.01	2.28	2.40	2.24
11	MODESTO	1305.	718.	799.	858.	
	MODESTO		2.04	2.33	2.45	2.28
12	OAKLAND	1256.	698.	776.	832.	
	OAKLAND		1.69	1.90	1.95	1.86
13	POMONA	1304.	718.	799.	857.	
	POMONA		2.04	2.33	2.45	2.29
14	SALINAS	1358.	741.	825.	885.	
	SALINAS		1.75	1.98	2.07	1.94
15	SAN LEANDRO	1266.	702.	780.	837.	

California analysis—Continued

ORIGIN: SCHILLING, MT. REVENUES AND COST IN $ PER CAR, AND REVENUE/COST RATIOS SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) E-P 313 RATES—Con.

NO	DESTINATION NAME	MILES	SHORT HAUL COSTS 90M	120M	140M	TOTAL
	SAN LEANDRO		1.68	1.89	1.94	1.84
16	SANTA FE SPRS	1734.	901.	1006.	1082.	
	SANTA FE SPRS		1.63	1.85	1.94	1.82
17	SANTA PAULA	1611.	0.	0.	0.	
	SANTA PAULA		0.0	0.0	0.0	
18	SUNNYVALE	1298.	715.	796.	854.	
	SUNNYVALE		1.65	1.85	1.90	1.81
19	UNION CITY	1245.	693.	770.	826.	
	UNION CITY		1.70	1.92	1.97	1.87
	TOTAL		1.83	2.07	2.16	2.03

NO	DESTINATION NAME	MILES	LONG HAUL COSTS 90M	120M	140M	TOTAL
1	ALAMEDA	1563.	828.	923.	992.	
	ALAMEDA		1.42	1.60	1.64	1.56
2	ANAHEIM	1893.	968.	1082.	1165.	
	ANAHEIM		1.52	1.72	1.80	1.69
3	BUENA PARK	1894.	968.	1083.	1165.	
	BUENA PARK		1.51	1.72	1.80	1.69
4	CARSON	0.	0.	0.	0.	
	CARSON		0.0	0.0	0.0	0.0
5	COLTON	1846.	948.	1059.	1140.	
	COLTON		1.60	1.76	1.84	1.74
6	COMPTON	1802.	929.	1038.	1117.	
	COMPTON		1.58	1.79	1.88	1.76
7	CORONA	1867.	957.	1070.	1151.	
	CORONA		1.53	1.74	1.82	1.71
8	FRESNO	1514.	807.	900.	967.	
	FRESNO		1.82	2.07	2.17	2.03
9	FULLERTON	1890.	967.	1081.	1163.	
	FULLERTON		1.52	1.72	1.81	1.69
10	LOS ANGELES	1903.	972.	1087.	1170.	
	LOS ANGELES		1.51	1.71	1.80	1.68

California analysis—Continued

ORIGIN: SCHILLING, MT. REVENUES AND COST IN $ PER CAR, AND REVENUE/COST RATIOS SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) E-P 313 RATES—Con.

NO	DESTINATION NAME	MILES	LONG HAUL COSTS 90M	120M	140M	TOTAL
11	MODESTO	1421.	768.	855.	918.	
	MODESTO		1.91	2.18	2.29	2.14
12	OAKLAND	1572.	832.	928.	997.	
	OAKLAND		1.42	1.59	1.63	1.55
13	POMONA	1869.	958.	1071.	11.52.	
	POMONA		1.53	1.74	1.82	1.71
14	SALINAS	1432.	772.	860.	924.	
	SALINAS		1.68	1.90	1.98	1.86
15	SAN LEANDRO	1420.	767.	855.	918.	
	SAN LEANDRO		1.54	1.73	1.77	1.68
16	SANTA FE SPRS	1901.	971.	1086.	1169.	
	SANTA FE SPRS		1.51	1.71	1.80	1.68
	SANTA PAULA	1779.	0.	0.	0.	
	SANTA PAULA		0.0	0.0	0.0	0.0
18	SUNNYVALE	1452.	781.	870.	934.	
	SUNNYVALE		1.51	1.70	1.74	1.66
19	UNION CITY	1553.	824.	919.	987.	
	UNION CITY		1.43	1.61	1.65	1.57
	TOTAL		1.56	1.76	1.83	1.72

ORIGIN: SCHILLING, MT. REVENUES AND COSTS IN $ PER CAR, AND REVENUE/COST RATIOS SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) PROPOSED RATES

NO	DESTINATION NAME	REVENUES 90M	120M	140M
1	ALAMEDA	1197.	1512.	1708.
	ALAMEDA	RATIO		
2	ANAHEIM	1233.	1560.	1764.
	ANAHEIM	RATIO		
3	BUENA PARK	1305.	1656.	1862.
	BUENA PARK	RATIO		
4	CARSON	0.	0.	0.
	CARSON	RATIO		
5	COLTON	1197.	1512.	1708.
	COLTON	RATIO		
6	COMPTON	1305.	1656.	1862.

California analysis—Continued

ORIGIN SCHILLING, MT. REVENUES AND COSTS IN $ PER CAR, AND REVENUE/COST RATIOS
SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) PROPOSED RATES—Continued

	DESTINATION	REVENUES		
NO	NAME	90M	120M	140M
	COMPTON	RATIO		
7	CORONA	1305.	1656.	1862.
	CORONA	RATIO		
8	FRESNO	1233.	1560.	1764.
	FRESNO	RATIO		
9	FULLERTON	1224.	1548.	1750.
	FULLERTON	RATIO		
10	LOS ANGELES	1233.	1560.	1764.
	LOS ANGELES	RATIO		
11	MODESTO	1224.	1548.	1750.
	MODESTO	RATIO		
12	OAKLAND	1197.	1512.	1708.
	OAKLAND	RATIO		
13	POMONA	1224.	1548.	1750.
	POMONA	RATIO		
14	SALINAS	1251.	1584.	1792.
	SALINAS	RATIO		
15	SAN LEANDRO	1197.	1512.	1708.
	SAN LEANDRO	RATIO		
16	SANTA FE SPRS	1305.	1656.	1862.
	SANTA FE SPRS	RATIO		
17	SANTA PAULA	0.	0.	0.
	SANTA PAULA	RATIO		
18	SUNNYVALE	1206.	1524.	1722.
	SUNNYVALE	RATIO		
19	UNION CITY	1179.	1488.	1694.
	UNION CITY	RATIO		
	TOTAL	RATIO		

California analysis—Continued

ORIGIN: SCHILLING, MT. REVENUES AND COSTS IN $ PER CAR, AND REVENUE/COST RATIOS
SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) PROPOSED RATES—Continued

NO	DESTINATION NAME	MILES	SHORT HAUL COSTS 90M	120M	140M	TOTAL
1	ALAMEDA	1255.	697.	775.	832.	
	ALAMEDA		1.72	1.95	2.05	1.92
2	ANAHEIM	1346.	736.	819.	879.	
	ANAHEIM		1.68	1.90	2.01	1.87
3	BUENA PARK	1633.	858.	957.	1029.	
	BUENA PARK		1.52	1.73	1.81	1.70
4	CARSON	0.	0.	0.	0.	
	CARSON		0.0	0.0	0.0	0.0
5	COLTON	1272.	704.	783.	841.	
	COLTON		1.70	1.93	2.03	1.90
6	COMPTON	1623.	853.	952.	1024.	
	COMPTON		1.53	1.74	1.82	1.70
7	CORONA	1700.	886.	989.	1064.	
	CORONA		1.47	1.67	1.75	1.64
8	FRESNO	1334.	731.	813.	873.	
	FRESNO		1.69	1.92	2.02	1.89
9	FULLERTON	1314.	722.	804.	862.	
	FULLERTON		1.69	1.93	2.03	1.89
10	LOS ANGELES	1336.	732.	814.	874.	
	LOS ANGELES		1.69	1.92	2.02	1.88
11	MODESTO	1305.	718.	799.	858.	
	MODESTO		1.70	1.94	2.04	1.90
12	OAKLAND	1256.	698.	776.	832.	
	OAKLAND		1.72	1.95	2.05	1.92
13	POMONA	1304.	718.	799.	857.	
	POMONA		1.70	1.94	2.04	1.90
14	SALINAS	1358.	741.	825.	885.	
	SALINAS		1.69	1.92	2.02	1.89
15	SAN LEANDRO	1266.	702.	780.	837.	
	SAN LEANDRO		1.71	1.94	2.04	1.90
16	SANTA FE SPRS	1734.	901.	1006.	1082.	
	SANTA FE SPRS		1.45	1.65	1.72	1.61
17	SANTA PAULA	1611.	0.	0.	0.	
	SANTA PAULA		0.0	0.0	0.0	0.0
18	SUNNYVALE	1298.	715.	796.	854.	

California analysis—Continued

ORIGIN: SCHILLING, MT. REVENUES AND COSTS IN $ PER CAR, AND REVENUE/COST RATIOS
SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) PROPOSED RATES—Continued

	DESTINATION		SHORT HAUL COSTS			
NO	NAME	MILES	90M	120M	140M	TOTAL
	SUNNYVALE		1.69	1.91	2.02	1.88
19	UNION CITY	1245.	693.	770.	826.	
	UNION CITY		1.70	1.93	2.05	1.90
	TOTAL		1.64	1.87	1.96	1.83

	DESTINATION		LONG HAUL COSTS			
NO	NAME	MILES	90M	120M	140M	TOTAL
1	ALAMEDA	1563.	828.	923.	992.	
	ALAMEDA		1.45	1.64	1.72	1.61
2	ANAHEIM	1893.	968.	1082.	1165.	
	ANAHEIM		1.27	1.44	1.51	1.42
3	BUENA PARK	1894.	968.	1083.	1165.	
	BUENA PARK		1.35	1.53	1.60	1.50
4	CARSON	0.	0.	0.	0.	
	CARSON		0.0	0.0	0.0	0.0
5	COLTON	1846.	948.	1059.	1140.	
	COLTON		1.26	1.43	1.50	1.40
6	COMPTON	1802.	929.	1038.	1117.	
	COMPTON		1.40	1.59	1.67	1.56
7	CORONA	1867.	957.	1070.	1151.	
	CORONA		1.36	1.55	1.62	1.52
8	FRESNO	1514.	807.	900.	987.	
	FRESNO		1.53	1.73	1.82	1.70
9	FULLERTON	1890.	967.	1081.	1163.	
	FULLERTON		1.27	1.43	1.50	1.41
10	LOS ANGELES	1903.	972.	1087.	1170.	
	LOS ANGELES		1.27	1.44	1.51	1.41
11	MODESTO	1421.	768.	855.	918.	
	MODESTO		1.59	1.81	1.91	1.78
12	OAKLAND	1572.	832.	928.	997.	
	OAKLAND		1.44	1.63	1.71	1.60
13	POMONA	1869.	958.	1071.	1152.	
	POMONA		1.28	1.45	1.52	1.42

California analysis—Continued

ORIGIN: SCHILLING, MT REVENUES AND COSTS IN $ PER CAR, AND REVENUE/COST RATIOS
SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) PROPOSED RATES—Continued

NO	DESTINATION NAME	MILES	LONG HAUL COSTS 90M	120M	140M	TOTAL
14	SALINAS	1432.	772.	860.	924.	
	SALINAS		1.62	1.84	1.94	1.81
15	SAN LEANDRO	1420.	767.	855.	918.	
	SAN LEANDRO		1.56	1.77	1.86	1.74
16	SANTA FE SPRS	1901.	971.	1086.	1159.	
	SANTA FE SPRS		1.34	1.52	1.59	1.49
17	SANTA PAULA	1779.	0.	0.	0.	
	SANTA PAULA		0.0	0.0	0.0	0.0
18	SUNNYVALE	1452.	781.	870.	934.	
	SUNNYVALE		1.54	1.75	1.84	1.72
19	UNION CITY	1553.	824.	919.	987.	
	UNION CITY		1.43	1.62	1.72	1.60
	TOTAL		1.40	1.59	1.67	1.56

ORIGIN: SCHLG/WALLULA, REVENUES AND COSTS IN $ PER CAR, AND REVENUE/COST RATIOS
SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) E-P 313 RATES

NO	DESTINATION NAME	REVENUES 90M	120M	140M
1	ALAMEDA	1008.	1260.	1400.
	ALAMEDA	RATIO		
2	ANAHEIM	1296.	1632.	1834.
	ANAHEIM	RATIO		
3	BUENA PARK	1008.	1260.	1400.
	BUENA PARK	RATIO		
4	CARSON			
	CARSON	RATIO		
5	COLTON	1296.	1632.	1834.
	COLTON	RATIO		
6	COMPTON	1296.	1632.	1400.
	COMPTON	RATIO		
7	CORONA	1296.	1632.	1400.
	CORONA	RATIO		

California analysis—Continued

ORIGIN SCHLG/WALLULA, REVENUES AND COSTS IN $ PER CAR, AND REVENUE/COST RATIOS
SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) E-P 313 RATES—Continued

	DESTINATION	REVENUES		
NO	NAME	90M	120M	140M
8	FRESNO	1107.	1368.	0.
	FRESNO	RATIO		
9	FULLERTON	1296.	1632.	1834.
	FULLERTON	RATIO		
10	LOS ANGELES	1296.	1632.	1834.
	LOS ANGELES	RATIO		
11	MODESTO	1044.	1320.	1470.
	MODESTO	RATIO		
12	OAKLAND	1008.	1260.	1400.
	OAKLAND	RATIO		
13	POMONA	2196.	2832.	1834.
	POMONA	RATIO		
14	SALINAS	1152.	1392.	1568.
	SALINAS	RATIO		
15	SAN LEANDRO	1008.	1260.	1400.
	SAN LEANDRO	RATIO		
16	SANTA FE SPRS	1296.	1632.	1834.
	SANTA FE SPRS	RATIO		
17	SANTA PAULA			
	SANTA PAULA	RATIO		
18	SUNNYVALE	1008.	1260.	1400.
	SUNNYVALE	RATIO		
19	UNION CITY	1008.	1260.	1400.
	UNION CITY	RATIO		
	TOTAL	RATIO		

	DESTINATION		SHORT HAUL COSTS			
NO	NAME	MILES	90M	120M	140M	TOTAL
1	ALAMEDA	1255.	697.	775.	832.	
	ALAMEDA		1.45	1.63	1.68	1.59
2	ANAHEIM	1346.	736.	819.	879.	
	ANAHEIM		1.76	1.99	2.09	1.96
3	BUENA PARK	1633.	858.	957.	1029.	

California analysis—Continued

ORIGIN SCHLG/WALLULA. REVENUES AND COSTS IN $ PER CAR, AND REVENUE/COST RATIOS
SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) E-P 313 RATES—Continued

NO	DESTINATION NAME	MILES	SHORT HAUL COSTS 90M	120M	140M	TOTAL
	BUENA PARK		1.18	1.32	1.36	1.29
4	CARSON					
	CARSON					
5	COLTON	1272.	704.	783.	841.	
	COLTON		1.84	2.08	2.18	2.05
6	COMPTON	1623.	853.	952.	1024.	
	COMPTON		1.52	1.71	1.37	1.53
7	CORONA	1700.	886.	989.	1064.	
	CORONA		1.46	1.65	1.32	1.47
8	FRESNO	1334.	731.	813.	873.	
	FRESNO		1.52	1.68	0.0	1.02
9	FULLERTON	1314.	722.	804.	862.	
	FULLERTON		1.79	2.03	2.13	1.99
10	LOS ANGELES	1336.	732.	814.	874.	
	LOS ANGELES		1.77	2.00	2.10	1.97
11	MODESTO	1305.	718.	799.	858.	
	MODESTO		1.45	1.65	1.71	1.61
12	OAKLAND	1256.	698.	776.	832.	
	OAKLAND		1.45	1.62	1.68	1.59
13	POMONA	1304.	718.	799.	857.	
	POMONA		3.06	3.55	2.14	2.89
14	SALINAS	1358.	741.	825.	885.	
	SALINAS		1.55	1.69	1.77	1.68
15	SAN LEANDRO	1266.	702.	780.	837.	
	SAN LEANDRO		1.44	1.61	1.67	1.58
16	SANTA FE SPRS	1734.	901.	1006.	1082.	
	SANTA FE SPRS		1.44	1.62	1.70	1.59
17	SANTA PAULA					
	SANTA PAULA					
18	SUNNYVALE	1298.	715.	796.	854.	
	SUNNYVALE		1.41	1.58	1.64	1.55
19	UNION CITY	1245.	693.	770.	826.	
	UNION CITY		1.45	1.64	1.69	1.60
	TOTAL		1.61	1.82	1.65	1.69

California analysis—Continued

ORIGIN SCHLG/WALLULA. REVENUES AND COSTS IN $ PER CAR. AND REVENUE/COST RATIOS
SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) E-P 313 RATES—Continued

	DESTINATION		LONG HAUL COSTS			
NO	NAME	MILES	90M	120M	140M	TOTAL
1	ALAMEDA	1563.	828.	923.	992.	
	ALAMEDA		1.22	1.36	1.41	1.34
2	ANAHEIM	1893.	968.	1082.	1165.	
	ANAHEIM		1.34	1.51	1.57	1.48
3	BUENA PARK	1894.	968.	1083.	1165.	
	BUENA PARK		1.04	1.16	1.20	1.14
4	CARSON					
	CARSON					
5	COLTON	1846.	948.	1059.	1140.	
	COLTON		1.37	1.54	1.61	1.51
6	COMPTON	1802.	929.	1038.	1117.	
	COMPTON		1.39	1.57	1.25	1.40
7	CORONA	1867.	957.	1070.	1151.	
	CORONA		1.35	1.53	1.22	1.36
8	FRESNO	1514.	807.	900.	967.	
	FRESNO		1.37	1.52	0.0	0.93
9	FULLERTON	1890.	967.	1081.	1163.	
	FULLERTON		1.34	1.51	1.58	1.48
10	LOS ANGELES	1903.	972.	1087.	1170.	
	LOS ANGELES		1.33	1.50	1.57	1.47
11	MODESTO	1421.	768.	855.	918.	
	MODESTO		1.36	1.54	1.60	1.51
12	OAKLAND	1572.	832.	928.	997.	
	OAKLAND		1.21	1.36	1.40	1.33
13	POMONA	1869.	958.	1071.	1152.	
	POMONA		2.29	2.65	1.59	2.16
14	SALINAS	1432.	772.	860.	924.	
	SALINAS		1.49	1.62	1.70	1.61
15	SAN LEANDRO	1420.	767.	855.	918.	
	SAN LEANDRO		1.31	1.47	1.53	1.44
16	SANTA FE SPRS	1901.	971.	1086.	1169.	
	SANTA FE SPRS		1.33	1.50	1.57	1.48
17	SANTA PAULA					
	SANTA PAULA					
18	SUNNYVALE	1452.	781.	870.	934.	

California analysis—Continued

ORIGIN SCHLG/WALLULA, REVENUES AND COSTS IN $ PER CAR, AND REVENUE/COST RATIOS
SINGLE CAR RATE (ONE CAR PER ORG/DST PAIR) E-P 313 RATES—Continued

DESTINATION			LONG HAUL COSTS			
NO	NAME	MILES	90M	120M	140M	TOTAL
	SUNNYVALE		1.29	1.45	1.50	1.42
19	UNION CITY	1553.	824.	919.	987.	
	UNION CITY		1.22	1.37	1.42	1.34
	TOTAL		1.37	1.54	1.40	1.44

Short tariff rail miles in connection with carload commodity rates on pulpboard, not corrugated or indented, STCC 26-311-16

FROM: TO: California destinations	Railroad locations	Springfield, OR		Lebanon, OR		Millersburg, OR		Gardiner, OR		Cordes, OR		Toledo, OR		Longview, WA	
		Miles	Route	Miles	Route	Miles	Route	Miles	Route	Miles	Route	Miles	Route	Miles	Route
Anaheim-----------	ATSF,SP,UP-	992	1	1,036	1	1,045	1	1,093	5	1,112	1	1,115	1	1,169	9
Antioch-----------	ATSF,SP----	574	1	618	1	627	1	675	5	694	1	697	1	750	9
Buena Park--------	ATSF,SP----	987	1	1,031	1	1,040	1	1,088	5	1,107	1	1,110	1	1,163	9
Carson------------	ATSF,SP,UP-	979	2	1,023	2	1,032	2	1,080	6	1,099	2	1,102	2	1,155	10
Colton------------	ATSF,SP,UP-	975	1	1,019	1	1,028	1	1,076	5	1,095	1	1,098	1	1,152	9
Compton-----------	SP---------	977	1	1,020	1	1,029	1	1,078	5	1,097	1	1,099	1	1,153	9
Corona------------	ATSF-------	1,011	3	1,055	3	1,064	3	1,112	7	1,131	3	1,134	3	1,187	11
Fresno------------	ATSF,SP----	688	1	732	1	741	1	789	5	808	1	811	1	864	9
Fullerton---------	ATSF,SP,UP-	990	1	1,034	1	1,043	1	1,091	5	1,110	1	1,113	1	1,166	9
Gilroy------------	SP---------	648	1	692	1	701	1	749	5	763	1	771	1	825	9
Los Angeles-------	ATSF,SP,UP-	964	1	1,008	1	1,017	1	1,065	5	1,084	1	1,087	1	1,140	9
Madera------------	ATSF,SP----	666	1	710	1	719	1	767	5	786	1	789	1	842	9
Modesto-----------	M&ET,SP,TWS	596	1	639	1	648	1	696	5	715	1	718	1	772	9
Newark------------	SP---------	607	1	651	1	660	1	703	5	727	1	730	1	783	9
Oakland-----------	ATSF,SP,WP-	585	1	629	1	638	1	687	5	706	1	708	1	762	9
Pomona------------	ATSF,SP,UP-	995	2	1,039	2	1,048	2	1,096	6	1,115	2	1,118	2	1,171	10
Sacramento--------	SP,WP------	524	1	567	1	576	1	625	5	644	1	646	1	700	9
Salinas-----------	SP---------	691	1	730	1	739	1	788	5	809	1	809	1	862	9
San Diego---------	ATSF,SDAE--	1,090	3	1,134	3	1,143	3	1,191	7	1,210	3	1,213	3	1,266	11
San Jose----------	SP,WP------	619	1	662	1	671	1	720	5	739	1	741	1	795	9
San Leandro-------	SP,WP------	595	1	639	1	648	1	696	5	715	1	718	1	771	9
Santa Fe Springs--	ATSF,SP----	977	1	1,021	1	1,030	1	1,078	5	1,097	1	1,100	1	1,153	9
Santa Paula-------	SP---------	967	1	1,011	1	1,020	1	1,068	5	1,087	1	1,090	1	1,143	9
Stockon-----------	ATSF,SP,WP-	566	1	610	1	618	1	667	5	686	1	689	1	742	9
Sunnyvale---------	SP---------	626	1	670	1	679	1	727	5	746	1	749	1	803	9
Torrance----------	ATSF,SP----	972	1	1,016	1	1,025	1	1,073	5	1,092	1	1,095	1	1,148	9
(2) Union City----	WP---------	634	4	678	4	686	4	735	8	754	4	757	4	884	12
Visalia-----------	ATSF,SP----	729	1	773	1	782	1	830	5	849	1	852	1	905	9

See notes at end of table.

Short tariff rail miles in connection with carload commodity rates on pulpboard, not corrugated or indented, STCC 26-311-16--Continued

FROM: / TO: California destinations	Railroad locations	Sumner, Tacoma, WA (1)		Port Townsend, WA		Bellingham, WA		Wallula, WA		Hillwood, WA		Lewiston, ID		Schilling, MT Prior December 31, 1976		Schilling, MT Effective December 31, 1976	
		Miles	Route	Miles	Route	Miles	Route	Miles	Route	Miles	Route	Miles	Route	Miles	Route	Miles	Route
Anaheim	ATSF,SP,UP	1,264	13	1,361	16	1,396	13	1,234	20	1,374	20	1,373	27	1,346	24	1,621	20
Antioch	ATSF,SP	845	13	942	16	977	13	815	20	955	20	954	27	1,208	23	N/C	23
Buena Park	ATSF,SP	1,258	13	1,355	16	1,390	13	1,229	20	1,369	20	1,368	27	1,616	20	N/C	20
Carson	ATSF,SP,UP	1,250	14	1,347	17	1,382	14	1,220	20	1,360	20	1,359	27	1,350	24	1,616	20
Colton	ATSF,SP,UP	1,247	13	1,364	16	1,379	13	1,217	20	1,357	20	1,356	27	1,272	24	1,604	20
Compton	SP	1,248	13	1,345	16	1,380	13	1,218	20	1,358	20	1,357	27	1,605	20	N/C	20
Corona	ATSF	1,202	15	1,379	18	1,414	15	1,295	22	1,435	22	1,434	29	1,291	25	1,653	23
Fresno	ATSF,SP	959	13	1,056	16	1,091	13	929	20	1,069	20	1,068	27	1,300	23	N/C	23
Fullerton	ATSF,SP,UP	1,261	13	1,358	16	1,393	13	1,232	20	1,372	20	1,371	27	1,314	25	1,619	20
Gilroy	SP	920	13	1,017	16	1,052	13	890	20	1,030	20	1,029	27	1,277	20	N/C	20
Los Angeles	ATSF,SP,UP	1,235	13	1,332	16	1,367	13	1,206	20	1,346	20	1,345	27	1,336	24	1,593	20
Madera	ATSF,SP	937	13	1,034	16	1,069	13	908	20	1,048	20	1,047	27	1,279	23	N/C	23
Modesto	MSET,SP,TWS	867	13	984	16	999	13	837	20	977	20	976	27	1,224	20	N/C	20
Newark	SP	878	13	975	16	1,010	13	849	20	989	20	988	27	1,236	20	N/C	20
Oakland	ATSF,SP,WP	857	13	954	16	989	13	827	20	967	20	966	27	1,214	20	N/C	20
Pomona	ATSF,SP,UP	1,266	14	1,363	17	1,398	14	1,238	20	1,378	20	1,377	27	1,304	24	1,625	20
Sacramento	SP,WP	795	13	892	16	927	13	765	20	905	20	904	27	1,132	26	N/C	26
Salinas	SP	957	13	1,054	16	1,089	13	927	20	1,067	20	1,066	27	1,315	20	N/C	20
San Diego	ATSF,SDAE	1,361	15	1,458	18	1,493	15	1,413	22	1,553	22	1,552	29	1,771	23	N/C	23
San Jose	SP,WP	890	13	987	16	1,022	13	860	20	1,000	20	999	27	1,247	20	N/C	20
San Leandro	SP,WP	866	13	963	16	998	13	836	20	976	20	975	27	1,223	20	N/C	20
Santa Fe Springs	ATSF,SP	1,248	13	1,345	16	1,380	13	1,219	20	1,359	20	1,358	27	1,506	20	N/C	20
Santa Paula	SP	1,238	13	1,335	16	1,370	13	1,209	20	1,349	20	1,348	27	1,596	20	N/C	20
Stockton	ATSF,SP,WP	837	13	934	16	969	13	808	20	948	20	947	27	1,177	26	N/C	26
Sunnyvale	SP	898	13	995	16	1,030	13	868	20	1,008	20	1,007	27	1,258	20	N/C	20
Torrance	ATSF,SP	1,243	13	1,340	16	1,375	13	1,214	20	1,354	20	1,353	27	1,601	20	N/C	20
(2) Union City	WP	878	12	1,095	19	1,010	12	887	12	1,037	12	1,026	30	1,245	26	N/C	26
Visalia	ATSF,SP	1,000	13	1,097	16	1,132	13	971	20	1,111	20	1,110	27	1,358	20	N/C	20

See notes at end of table.

Alameda (within switching limits of Oakland—Oakland miles apply)
Southgate (within switching limits of Los Angeles—Los Angeles miles apply)

N/C—No change.

(1)—Miles shown are from Tacoma. Miles from Sumner are 11 miles greater.

(2)—Open and prepay station list 91, station list Publishing Co., Agent, ICC-A-56, shows Union City as also located on SP, subject to note 1544, which explains that Union City is an incorporated city, area of which includes stations of Alvarado and Decoto, and freight should be billed to Alvarado or Decoto. Therefore, actual station of Union City is served only by WP, and miles to Union City on WP have been used.

EXPLANATION OF ROUTES:

1—SP
2—SP-Los Angeles-UP
3—SP-Los Angeles-ATSF
4—SP-Stockton-WP
5—LPN-Gardiner JCT-SP
6—LPN-Gardiner JCT-SP-Los Angeles-UP
7—LP-Gardiner JCT-SP-Los Angeles-ATSF
8—LPN-Gardiner JCT-SP-Stockton-WP
9—UP-Portland-SP
10—UP-Portland-SP-Los Angeles-UP
11—UP-Portland-SP-Los Angeles-ATSF
12—BN-Bieber-WP
13—BN-Portland-SP
14—BN-Portland-SP-Los Angeles-UP
15—BN-Portland-SP-Los Angeles-ATSF
16—MILW-Portland-SP
17—MILW-Portland-SP-Los Angeles-UP
18—MILW-Portland-SP-Los Angeles-ATSF
19—MILW-Portland-BN-Bieber-WP
20—BN-Klamath Falls-SP
21—UP-East Portland-SP-Los Angeles-UP
22—BN-Bieber-WP-Stockton-ATSF
23—MILW-Spokane-BN-Bieber-WP-Stockton-ATSF
24—MILW-Silver Bow-UP
25—MILW-Silver Bow-UP-Barstow-ATSF
26—MILW-Spokane-BN-Bieber-WP
27—CSP-Riparia-BN-Klamath Falls-SP
28—CSP-Riparia-UP-East Portland-SP-Los Angeles-UP
29—CSP-Riparia-BN-Bieber-WP-Stockton-ATSF
30—CSP-Riparia-BN-Bieber-WP

Tariff Authority:

Pacific Southcoast Freight Bureau, Agent, Freight Tariff 315-A, ICC 1974.
Pacific Southcoast Freight Bureau, Agent, Freight Tariff 2-0, ICC 1923.
Burlington Northern Inc. Freight Tariff 2, ICC 2.
Athcison, Topeka and Santa Fe Railway Company Freight Tariff 9900-E, ICC 15162.
Burlington Northern Inc. Freight Tariff 3, ICC 3.
Chicago, Milwaukee, St. Paul and Pacific Railroad Tariff 11850-D, ICC B-8304.
Southern Pacific Transportation Co. Freight Tariff 420-D, ICC 4687.
Union Pacific Railroad Co. Freight Tariff 4000-B, ICC 5537.
Western Pacific Railroad Co. Distance Table GFD 39-G, ICC 490.

APPENDIX D

Pulpboard shipments of 90,000 pounds from Schilling, Montana to various California destinations (Cost and revenues are in dollars per car)

Destination	Miles[1]		Interchange cost[2]		Line-haul		Terminal[5] cost per car	Total cost per car		Revenue[6] per car	Ratio revenue to cost per car	
	Short haul	Long haul	Short haul	Long haul	Short haul[3]	Long haul[4]		Short haul (4+6+8)	Long haul (5+7+8)		Short haul (11+9)	Long haul (11+10)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
Alameda	1,255	1,563	[3]$131	[3]$131	$570	$705	$152	$853	$988	$1,179	1.38	1.19
Anaheim	1,346	1,893	[1]44	[2]87	610	849	152	806	1,088	1,467	1.82	1.35
Buena Park	1,633	1,894	[1]44	[2]87	735	850	152	931	1,089	1,467	1.58	1.35
Colton	1,272	1,846	[1]44	[2]87	577	829	152	773	1,068	1,521	1.97	1.42
Compton	1,623	1,802	[1]44	[1]44	731	809	152	927	1,005	1,467	1.58	1.46
Corona	1,700	1,867	[2]87	[2]87	765	838	152	1,004	1,077	1,467	1.46	1.36
Fresno	1,334	1,514	[1]44	[2]87	604	683	152	800	922	1,467	1.83	1.59
Fullerton	1,314	1,890	[2]87	[2]87	595	848	152	834	1,087	1,467	1.76	1.35
Los Angeles	1,336	1,903	[1]44	[2]87	605	854	152	801	1,093	1,467	1.83	1.34
Modesto	1,305	1,421	[2]87	[1]44	592	642	152	831	838	1,467	1.77	1.75
Oakland	1,256	1,572	[3]131	[2]87	570	709	152	853	948	1,179	1.38	1.24
Pomona	1,304	1,869	[1]44	[2]87	591	839	152	787	1,078	1,467	1.86	1.36
Salinas	1,358	1,432	[1]44	[1]44	615	647	152	811	843	1,296	1.60	1.54
San Leandro	1,266	1,420	[1]44	[1]44	574	642	152	770	838	1,179	1.53	1.41
Santa Fe Springs	1,734	1,901	[2]87	[2]87	780	853	152	1,019	1,092	1,467	1.44	1.34
Sunnyvale	1,298	1,452	[1]44	[1]44	588	656	152	784	852	1,179	1.50	1.38
Union City	1,245	1,553	[2]87	[2]87	565	700	152	804	939	1,179	1.47	1.26
Total								14,388	16,845	23,382	1.63	1.39

NOTES:

[1] Miles from appendix B, pages 22 and 23.

[2] Actual number of iterchanges () from exhibit GML-2, pages 3 and 4 multipled by variable interchange cost per car of 4359.343 cent from exhibit 1, line 24.

[3] First 115 way train-miles in column 2 x 60.957 cent plus remaining miles x 43.821 cent from exhibit 1, line 13 for respective weight.

[4] First 115 way train-miles in column 3 x 60.957 cent plus remaining miles x 43.821 cent from exhibit 1, line 13 for respective weight.

[5] Exhibit 1, line 21 for respective weights.

[6] From exhibit HWW-1, page 1.

APPENDIX D

Pulpboard shipments of 120,000 pounds from Schilling, Montana to various destinations
(Costs and revenues are in dollars per car)

Destination	Miles[1]		Interchange cost[2]		Line-haul		Terminal[5] cost per car	Total cost per car		Revenue[6] per car	Ratio revenue to cost per car	
	Short haul	Long haul	Short haul	Long haul	Short haul[3]	Long haul[4]		Short haul (4+6+8)	Long haul (5+7+8)		Short haul (11÷9)	Long haul (11÷10)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
Alameda	1,255	1,563	'$131	'$313	$654	$809	$155	$940	$1,095	$1,476	1.57	1.35
Anaheim	1,346	1,893	'44	‘87	700	974	155	899	1,216	1,860	2.07	1.53
Buena Park	1,633	1,894	'44	‘87	844	975	155	1,043	1,217	1,860	1.78	1.53
Colton	1,272	1,846	'44	‘87	663	951	155	862	1,193	1,860	2.16	1.56
Compton	1,623	1,802	'44	'44	839	929	155	1,038	1,128	1,860	1.79	1.65
Corona	1,700	1,867	‘87	‘87	878	961	155	1,120	1,203	1,860	1.66	1.55
Fresno	1,334	1,514	'44	‘87	694	784	155	893	1,026	1,860	2.08	1.81
Fullerton	1,314	1,890	‘87	‘87	684	973	155	926	1,215	1,860	2.01	1.53
Los Angeles	1,336	1,903	'44	‘87	695	979	155	894	1,221	1,860	2.08	1.52
Modesto	1,305	1,421	‘87	'44	679	737	155	921	936	1,860	2.02	1.99
Oakland	1,256	1,572	'131	‘87	655	813	155	941	1,055	1,476	1.57	1.40
Pomona	1,304	1,869	'44	‘87	697	962	155	878	1,204	1,860	2.12	1.54
Salinas	1,358	1,432	'44	'44	706	743	155	905	942	1,632	1.80	1.73
San Leandro	1,266	1,420	'44	'44	660	737	155	859	936	1,476	1.72	1.58
Santa Fe Springs	1,734	1,901	‘87	‘87	895	978	155	1,137	1,220	1,860	1.64	1.52
Sunnyvale	1,298	1,452	'44	'44	676	753	155	875	952	1,476	1.69	1.55
Union City	1,245	1,553	‘87	‘87	649	804	155	891	1,046	1,476	1.66	1.41
Total								16,022	18,805	29,472	1.84	1.57

NOTES:

[1] Miles from appendix B, pages 22 and 23.

[2] Actual number of interchanges () from exhibit GML-2, pages 3 and 4 multipled by variable interchange cost per car of 4359.343 cent from exhibit 1, line 24.

[3] First 115 way train-miles in column 2 x 70.884 cent plus remaining miles x 50.220 cent, from exhibit 1, line 13 for respective weight.

[4] First 115 way train-miles in column 3 x 70.884 cent plus remaining miles x 50.220 cent, from exhibit 1, line 13 for respective weight.

[5] Exhibit 1, line 21 for respective weights.

[6] From exhibit HWW-1, page 1.

APPENDIX D

Pulpboard shipments of 140,000 pounds from Schilling, Montana to various California destinations (Costs and revenues are in dollars per car)

Destination	Miles[1]		Interchange cost[2]		Line-haul		Terminal[5] cost per car	Total cost per car		Revenue[6] per car	Ratio revenue to cost per car	
	Short haul	Long haul	Short haul	Long haul	Short haul[3]	Long haul[4]		Short haul (4+6+8)	Long haul (5+7+8)		Short haul (11+9)	Long haul (11+10)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
Alameda	1,255	1,563	[3]$131	[3]$131	$715	$884	$158	$1,004	$1,173	$1,624	1.62	1.38
Anaheim	1,346	1,893	[1]44	[2]87	765	1,065	158	967	1,310	2,100	2.17	1.60
Buena Park	1,633	1,894	[1]44	[2]87	923	1,066	158	1,125	1,311	2,100	1.87	1.60
Colton	1,272	1,846	[1]44	[2]87	725	1,040	158	927	1,285	2,100	2.27	1.63
Compton	1,623	1,802	[1]44	[1]44	917	1,015	158	1,119	1,217	2,100	1.88	1.73
Corona	1,700	1,867	[2]87	[2]87	959	1,051	158	1,204	1,296	2,100	1.74	1.62
Fresno	1,334	1,514	[1]44	[2]87	759	857	158	961	1,102	2,100	2.19	1.91
Fullerton	1,314	1,890	[2]87	[2]87	748	1,064	158	993	1,309	2,100	2.11	1.60
Los Angeles	1,336	1,903	[1]44	[2]87	760	1,071	158	962	1,316	2,100	2.18	1.60
Modesto	1,305	1,427	[2]87	[1]44	743	806	158	988	1,008	2,100	2.13	2.08
Oakland	1,256	1,572	[3]131	[2]87	716	889	158	1,005	1,134	1,624	1.62	1.43
Pomona	1,304	1,869	[1]44	[2]87	742	1,052	158	944	1,297	2,100	2.22	1.62
Salinas	1,358	1,432	[1]44	[1]44	772	812	158	974	1,014	1,834	1.88	1.81
San Leandro	1,266	1,420	[1]44	[1]44	721	806	158	923	1,008	1,624	1.76	1.61
Santa Fe Springs	1,734	1,901	[2]87	[2]87	978	1,070	158	1,223	1,315	2,100	1.72	1.60
Sunnyvale	1,298	1,452	[1]44	[1]44	739	823	158	941	1,025	1,624	1.73	1.58
Union City	1,245	1,553	[2]87	[2]87	710	879	158	955	1,124	1,624	1.70	1.44
Total								17,215	20,244	33,054	1.92	1.63

NOTES:

[1] Miles from appendix B, pages 22 and 23.

[2] Actual number of interchanges () from exhibit GML-2, pages 3 and 4 multiplied by variable interchange cost per car of 4359.343 cent from exhibit 1, line 24.

[3] First 115 way train-miles in column 2 x 78.078 cent plus remaining miles x 54.866 cent from exhibit 1 for respective weight.

[4] First 115 way train-miles in column 3 x 78.078 cent plus remaining miles x 54.866 cent from exhibit 1 for respective weight.

[5] Exhibit 1, line 21 for respective weights.

[6] From exhibit HWW-1, page 1.

No. 36596

PETITION FOR DECLARATORY ORDER—RATES ON SHIPMENTS OF SUPERPHOSPHATE FROM FLORIDA TO VARIOUS DESTINATIONS

Decided August 11, 1978

1. Paragraph (k) in supplement 7 of Tariff of Increased Rates and Charges X-318 and the parallel provision in Tariff of Increased Rates and Charges X-330, found to apply only in connection with rates applicable over routes in which the St. Louis Southwestern Railway may participate.
2. The exemption in paragraph (n) in supplement 7 to the Ex Parte No. 318 tariff, and the parallel provision in the Ex Parte No. 330 tariff, found not to apply on movements to points in Illinois Freight Association Territory. Proceeding discontinued.

Phil C. Beverly for petitioner.
Richard S. M. Emrich III and *Harold E. Spencer* for replicants.

DECISION OF THE COMMISSION

MURPHY, *Commissioner:*

By petition filed February 16, 1978, various shipper interests (for convenience replicants[1]) have appealed two of the findings made in the initial decision served January 27, 1978. A reply was filed on March 6, 1978, by Seaboard Coast Line Railroad Company (SCL or petitioner).

This proceeding was initiated pursuant to section 554(e) of the Administrative Procedure Act and addresses the issue of whether provisions in the Ex Parte No. 318 and 330 tariffs prevent SCL from charging the Ex Parte No. 318 increase of 7 percent on shipments of superphosphate from Florida to various destinations, as set forth in the initial decision, and limit the increase under Ex Parte No. 330 on these movements to 5 percent. The Administrative Law Judge found that the provisions in issue did not prevent and limit the general increases as argued. Replicants dispute various findings in the initial decision supporting this conclusion.

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[1] Agrico Chemical Company, Amoco Oil Company, CF Industries, Inc., FS Services, Inc., Farm Bureau Services, Inc., Indiana Farm Bureau Cooperative, Inc., International Minerals & Chemical Corporation, Landmark, Inc., Midland Cooperative, Inc., Missouri Farmers Association, Inc., The Ohio Farmers Grain & Supply Association.

The first finding to which replicants object is that paragraph (k) in Ex Parte No. 318 and parallel paragraph (1) in Ex Parte No. 330[2] do not prevent SCL from taking the full ex parte increases. Paragraph (k) states that the increases will not apply to:

> Rates or charges applicable from, to, via or at points on the following carriers:
>
> SP SPT SSW[3]

It is replicants' position that since Thebes and East St. Louis, IL, are points on SSW, no increase is applicable on any of SCL's routes which traverse those points.

We affirm the finding that the SCL's increases are not prevented or limited by this language. The finding is correct for several reasons. First, the paragraph referred to was published by the independent action of the Southern Pacific Transportation System (SP), of which St. Louis South Western Railway Company (SSW), is a part. *Increased Freight Rates and Charges—1976,* 355 I.C.C. 254, 258, 304, 306 (1976).

To find that several carriers acting for their own account could bind all other carriers crossing points which the several carriers serve is to contort independent action to where it is not independent at all. Independent action under section 5b of the Interstate Commerce Act, does not give any carrier the power to abridge another carrier's rights. Thus, we have stated that unilateral independent action by only one party to a joint rate is impossible, *Declaratory Order—Rule 52 of Tariff Cir. No. 20,* 337 I.C.C. 274, 280 (1970); and that we have no intention of granting special permission to reverse effective joint rates unless all parties to the rate agree to the change. ***Southern Ry. Co.—Petition for Declaratory Order,*** 356 I.C.C. 590, 591 (1978); 49 CFR 1300.58(b). If we were to find that in every case in which a carrier's route intersects any points served by the SP that the carrier may not apply these general increases, SP's "independent action" would have a great effect on an untold number of carriers without their consent. Moreover, those carriers do not even necessarily participate in joint rates with SP over these routes. Thus, SP would have no reason to want to keep them from taking the full increases. It is by far the more rational interpretation of the tariff provisions that SP's flagout and holddown were only for its own account; and that paragraphs (n)[4] and (2)[5] in Ex Parte No. 318 and 330, respectively, were published in reaction to SP's action for the account of all other railroads. ***Increased Freight Rates, supra*** at 306 (concurrence of Commissioner O'Neal). Thus, paragraphs (k) and (l) have no bearing on SCL's rates, when traffic merely traverses points served by SSW.

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[2] APPLICATION OF MAXIMUM INCREASES

1. Rates or charges applicable from, to, via or at points on the following carriers:

*** SSW ***

are subject to a MAXIMUM INCREASE of five (5) percent ***.

Effective January 14, 1977, paragraph (1) was changed to read:

(a) Rates or charges applicable from or to points in the following carriers when these carriers perform originating and/or terminating line-haul services, and rates and charges applicable at points on these carriers for account of these carriers.

*** SSW ***

are subject to a MAXIMUM INCREASE of five (5) percent ***.

The effect of this change, which was not made in the parallel Ex Parte No. 318 provision, is discussed hereafter.

[3] St. Louis South Western Railway Company.

Second, we note that if paragraphs (k) and (l) had the meaning replicants suggest (i.e., that any carrier crossing points served by SSW may not take the full increases), there would be no reason for the publication of paragraphs (n) and (2), since the latter paragraphs would cover less than the former.[6] It is a fundamental principle of tariff construction that tariffs are interpreted to give effect to all of their provisions. ***Stokley-Van Camp, Inc.,*** v. ***Alton & S. R.*** 298 I.C.C. 491, 494 (1956). If paragraphs (n) and (2) are to have any effect, paragraphs (k) and (l) cannot mean what replicants contend they do.

Third, the language of paragraphs (k) and (l), which require that rates or charges affected be "applicable," and also refers to SSW, is sufficient to inform the average tariff user that the rates or charges must be applicable over SSW. This reasoning does not rely on the principle that to express one thing implies the exclusion of all others (as replicants suggest), but only on what seems to be a reasonable construction of the words of the tariff. In addition, as discussed in the initial decision, for a rate or charge to be applicable to a carrier, it must apply over a route in which that carrier participates. Thus, it would not apply to routes merely traversed by SCL in which SSW did not participate.

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[4] (n) Rates or charges applying via all routes in which any carrier participates between points where any route is applicable via one or more of the carriers named in paragraph (k).

[5] (2) Any rate or charge via all routes, which applies via or in connection with any carrier named in paragraph (l) herein to the extent provided therein is subject to a MAXIMUM INCREASE of five (5) percent * * *.

[6] Paragraphs (n) and (2) would be more restricted in application than (k) and (l) since the former requires that there must be routing via or in connection with SP between the involved points.

Turning now to the remaining arguments raised by replicants, they contend that the Administrative Law Judge was in error in relying on the intention of the carriers in framing the tariff provisions to justify his findings. Replicants maintain that the carriers' intention is not revealed in the record. We agree insofar as replicants argue that there were no express statements of intention. However, our conclusions on tariff interpretation are based on the most reasonable construction of the tariffs. An independent statement of intention was not necessary. Replicants' own statement that the carriers' true intention was to meet market competition is entitled to little weight since they do not state why they believe this to be true. Moreover, any intention should be discernible from the tariff. *Essex Wire Corp.* v. *Chicago N.W. Ry. Co.*, 302 I.C.C. 417, 418 (1957).

Replicants also maintain that it was error to conclude that because paragraph (n) refers to routes, paragraph (k) must also be interpreted to refer to routes and to conclude that (k) and (n) are companion provisions. We affirm the finding that (k) and (n) are companion provisions. In fact paragraph (n) specifically refers to paragraph (k). As stated earlier, the two paragraphs are complementary in that by paragraph (n) the carriers attempted to meet competition from SP's independent action in paragraph (k). However, merely because paragraph (n) refers to routes, does not by itself compel the conclusion that paragraph (k) also refers to routes. As previously discussed, the term "applicable" rates and charges used in paragraph (k) itself indicates that (k) refers to routes.

The amendments to the Ex Parte No. 330 tariff, which expressly restricted the application of paragraph (1) to routes over which SSW participates, replicants argue, was an admission that prior to the amendment, paragraph (1) [and by implication paragraph (k)] was not restricted to routes over SSW. Replicants contend that the Administrative Law Judge was wrong in finding that any change was unintentional, particularly since the same change was later made in the Ex Parte Nos. 336 and 343 tariffs. However, the Administrative Law Judge did not conclude that the change was unintentional. Rather, he found that it *was not* an unconscious "Freudian slip." Nor was the change evidence that the prior publication was defective. See *Jacksonville Paper Co.* v. *Florida East Coast Ry.,* 289 I.C.C. 165, 168 (1953). If we were to find that tariff changes are acknowledgments of some defect in earlier versions, we would discourage carriers from clarifying their tariffs. It is our judgment that the tariff amendment merely clarified the existing tariff.

Replicants argue that the use of the tariff symbol denoting a rate increase proves that the addition of the route restriction did result in a material change. However, the Administrative Law Judge correctly concluded that the use of the increase symbol was not a result of the route restrictions, but was used because the holddown had been changed to apply only to originating and terminating services, thus excluding intermediate services. Therefore, the full increase went into effect on intermediate services, necessitating use of the increase symbol.

It is also argued by replicants that it was incorrect to reach a conclusion different from that expressed in Commission letters dated September 27 and October 15, 1976. These conclusions, which were in response to letters from petitioner and one of the replicants, were reached without benefit of the evidence and argument in this proceeding. Moreover, it was clearly stated in the second letter that the views expressed "are informal and are without prejudice to a different conclusion should the matter come before the Commission on a formal docket."

The second finding to which replicants' object is that the holddown and flagout are not effective on SCL routes from origins in central Florida to points in Illinois Freight Association Territory (IFA) because of language in paragraphs (n) and (2). The central question here is whether SSW has routing from Thebes to IFA, in which case the holddown and flagout would apply. Replicants argue that there must be such a route since in the initial decision we found that there was a route for SCL from the same origins to Central Freight Association Territory (CFA). Replicants argue that, since IFA is intermediate to CFA, it is illogical not to have a route to IFA. We have no grounds for speculating why SSW did not publish such a route. However, the applicable tariffs do not contain one. Similarly, replicants contend that the provisions governing IFA and CFA are companion provisions, and should achieve the same routing result. Again, if the same result was intended, it certainly does not appear in the tariffs, one of which contains a vital routing restriction only applying west of the Mississippi River while the other contains a systemwide restriction. This has been thoroughly discussed in the initial decision and need not be further discussed here.

We, therefore, find that the initial decision is correct in all material respects.

It is ordered:

This proceeding is discontinued.

No. 36551

JOINT PETITION FOR DECLARATORY ORDER— SWITCHING CHARGES

Decided November 22, 1977

Upon petition for declaratory order, switching charges sought to be collected for weekend and expedited service, on shipments of automobiles and automobile parts at Lansing, Mich., and Anderson and Muncie, Ind., on and between June 6, 1973, and May 31, 1976, found inapplicable. Proceeding discontinued.

John G. Makris and *Joseph M. O'Malley,* for Penn Central Transportation Company.

Benson T. Buck and *Dennis J. Helfman,* for General Motors Corp.

S. J. Jablonski, for intervener in support of General Motors Corp.

REPORT AND ORDER OF THE COMMISSION

REVIEW BOARD NUMBER 4 MEMBERS
FITZPATRICK, SHAW, AND FISHER

BY THE BOARD:

The modified procedure was followed. Pursuant to section 17(9)(b) of the Interstate Commerce Act, the proceeding has been assigned to this board for initial disposition. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for the proper disposition of this proceeding.

This proceeding was instituted pursuant to four orders of referral by the United States District Court for the Eastern District of Michigan, Southern Division, in civil action Nos. 671115, 770135, 770136, and 770137, directing the Penn Central Transportation Company (PC), and General Motors Corp. (GM), to file an appropriate petition with this Commission for the purpose of determining the applicability of certain tariff rates and rules, and their reasonableness, on certain shipments. In each of these actions, PC is seeking the collection of undercharges from GM.

Pursuant to the court orders, a joint petition was filed by GM and PC with this Commission on March 28, 1977, seeking a declaratory order under section 5 of the Administrative Procedure Act to determine whether switching charges[1] for (1) weekend switching services, and (2) for expedited switching services on weekdays were applicable and otherwise lawful on certain shipments switched on and between June 6, 1973, and May 31, 1976, at Lansing, Mich., and Anderson and Muncie, Ind. General Mills, Inc. (GMI), has been permitted to intervene and file a statement of views in support of GM.[2]

GM moves to strike the late-filed reply statement of one of PC's witnesses. The statement was received a few days late and causes no substantial prejudice to GM. The motion is denied.

WEEKEND SWITCHING

The shipments switched on weekends were billed switching charges based on the following item in Conrail Switching Tariff 40109, I.C.C. 155 (PC series):

Item 12410[3]

> *** [W]hen special movements at terminal points are requested by Patron or required because of excessive dimensions, excessive weight, high center of gravity or other conditions not permitting normal operation at charge will be made, in addition to the regular freight or switching rates lawfully published in tariffs on file with the Interstate Commerce Commission on interstate traffic and with the various State Commissions on intrastate traffic of RB 2500 per hour or fraction thereof, subject to a minimum charge of RB 200 when the time consumed is eight (8) hours or less for the time required to make the movement and to return the engine and crew to the starting point. Any time required in excess of eight (8) hours will be charged for on the basis of RB 3800 per hour or franction thereof.

At Lansing, PC has three switching yards: Saginaw Yard, New Yard, and South Yard. Saginaw Yard is used to serve GM's Oldsmobile plants 2 and 3 and the Fisher Body plant. New Yard is used to serve Oldsmobile plant 1. South Yard is used for classification work and for switching certain other industries located at Lansing. Usually the Oldsmobile plants telephone petitioner on Thursday for

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[1] Switching charges are stated in amounts per car, unless otherwise indicated.

[2] The National Industrial Traffic League, Kimberly-Clark Corporation, and Archer Daniels Midland Company were also permitted to intervene with the limitation that no statements would be received until after initial disposition of the proceeding.

[3] Substantially the same item appears as rule 10, item 310, Conrail Special Train Tariff 40205-F, I.C.C. 51

Saturday switching and on Saturday for Sunday switching. In recent years these plants normally require recurring Saturday switching for two consecutive weeks. There is usually no switching on the third Saturday after which the alternating cycle is repeated. On Saturdays PC normally pulls about 60 cars and places 60 cars and on Sundays it normally places about 40 cars and pulls 40 cars. PC's trainmaster at Lansing states that the train crews called for Saturday switching do basically the same type of work for GM-Olds as during the week. However, some of the crew must be paid time-and-a-half for overtime because they have already worked a 5-day week. Moreover, sometimes an engineer willing to work Saturdays must come from Jackson, Mich., 37 miles away, to do the switching at Lansing. For this he would receive 100 miles deadhead pay (50 miles each way) of $60, plus his regular pay, and 15 cents per miles as mileage pay.

The Fisher Body plant, which is immediately adjacent to the Saginaw Yard, requires substantially the same weekend switching service as that described above for Oldsmobile. Several years ago the Fisher Body plant required only occasional Saturday switching, but for the past few years it normally requires switching on two out of every three Saturdays. About 3 miles from the Fisher Body plant is the track where PC interchanges cars with Chesapeake and Ohio Railway (C&O).

GM has a Chevrolet plant at Muncie which is served by PC. The normal weekday operation consists of 16 to 18 cars switched in or out. Several years ago the daily switch was at 10:30 p.m., but was changed, first to 6 p.m., and later to 7:30 p.m. Between 1973 and 1977 GM frequently requested additional switching service from PC in conjunction with its decision to be in production on Saturdays. Usually it would call on Thursday or Friday requesting Saturday switching, and then confirm in writing on Friday or Saturday the request for Saturday switching. At first, these requests for Saturday switching were irregular, but in recent years this service was requested more frequently. No weekend switching was requested during July and August. The traffic manager for the Muncie plant states that, between August of 1969 and April of 1972, PC performed weekend switching service at the Cheverolet plant without additional charges. Beginning in May 1972, PC began seeking to charge for weekend switching at the Muncie plant, but the traffic manager states that no legal action to collect these charges was commenced during the statutory 3-year period.

GM's Guide Division has a plant at Anderson. This plant has received both weekday and weekend switching from PC for many years. Normally it phones PC on Thursday requesting switching service for Saturday and sometimes Sunday. The request is later confirmed in wirting. Usually from 14 to 18 loaded cars are pulled from the plant each Saturday, and the same number of empty cars placed there. PC states that the switching service performed on Saturday and Sunday is of the same nature and type as is provided during the week. However, this weekend work averages only 4 hours each day, while the crew is paid for 8 hours. PC did not charge GM for this weekend switching service until early 1975, and GM has refused to pay bills for this service. GM states that during 1976 PC's billing practice for this weekend switching service has been inconsistent, and that no bills were ever received for switching on at least six weekends.

GM has over 168 industrial facilities served by 28 different railorads none of which prior to 1972 charged for weekend switching. Since 1972 PC has attempted to charge for weekend switching but not uniformly. The following table shows those GM divisions which have and have not been billed for weekend switching since May 1972.

TABLE I

Divisions billed by C	*Divisions not billed by C*
Chevrolet-Bay City	Chevrolet-Detroit[1]
Chevrolet-Buffalo	Chevrolet-Indianapolis
Chevrolet-Massena	Chevrolet-Parma[1]
Chevrolet-Muncie	Chevrolet-Tonowanda
Chevrolet-Warren	Fisher Body-Columbus
Fisher Body-Cleveland[1]	Fisher Body-Detroit[1]
Fisher Body-Elmira	Fisher Body-Grand Rapids
Fisher Body-Kalamazoo[1]	Fisher Body-Lordstown
Fisher Body-Lansing	Fisher Body-Mansfield
Guide-Anderson	Fisher Body-Marion
Guide-Anderson	Fisher Body-Pittsburgh[1]
Oldsmobile-Lansing[1]	Fisher Body-Syracuse
	Fisher Body-Trenton

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[1] Indicates points served by railroads other than PC which have not assessed charges for weekend switching.

GMI has several plants in the eastern territory served by PC, Buffalo Creek Railroad (BCR), and other railroads operated by Conrail. GMI has now been advised by BCR that switching charges at its Buffalo plant will be assessed for weekend switching services. On and between June 1, 1976, and May 31, 1977, about 8,000 cars were loaded at the Buffalo plant. GMI's plants and warehouses frequently use weekend switching, and thus it objects to the potential increases in transportation charges at Buffalo if it is now charged extra for weekend switching service. It views weekend switching as a service which is and must continue to be included within the line-haul rates.

Concerning the section 6(7) issue, GM relies on the following items in the tariff containing rules governing receipt and delivery of freight (the rules tariff)[1] because the considered weekend switching service was provided at the carrier's ordinary operating convenience:

Item 200-B

> Rule 1. *** cars of freight moving at carload rates *** will be delivered on ***privately owned side tracks or industrial tracks near and connecting with the carrier's tracks without any additional charge, provided there are no conditions which *** prevent the carrier from *** delivering cars at its ordinary operating convenience ***.
>
> Rule 2. *** cars covered by Rule 1 will be *** delivered at *** unloading locations on tracks designated by the industry within the industrial plant site without any additional charge when that service can be ordinarily performed in continuous movement at the carrier's ordinary operating convenience, within the meaning of these terms as defined in Notes *** 2 *** of Item 210 ***.

Item 210-D

> Note 2. 'Ordinary operating convenience' means the time selected by the carrier when it is most advantageous to the carrier, in relation to its coordinated and harmonious switching activities in a particular switching zone, when the terminal services are performed by switching locomotives, or at the time the train arives at the plant site when the terminal services are performed by road-haul locomotives. Ordinarily it contemplates only one switch a day except when additional switches are made by the carrier in its own or the public interest, as distinguished from the industry's interest, to secure the prompt release of equipment or facilities, or when necessitated by the volume of traffic. Movements to, from or within the plant site at other times at the request of the industry or to meet the requirements of industrial operations are not at the carrier's ordinary operating convenience.

PC contends that this weekend service is not performed at the carrier's ordinary operating convenience, because it is done only at the shipper's request. Also, it stresses the fact that it must order special switching crews to work on Saturdays and Sundays, with most of the crew being paid time-and-a-half for overtime. On the basis of these facts, PC argues that weekend switching service constitutes the "special movements" as defined above in item 12410 of the switching tariff, and thus the switching charges provided in that item were correctly applied to the considered shipments.

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[1] Traffic Executive Association—Eastern Railroads, Agent, Local Freight Tariff 804, I.C.C. C-853, Supplement 30.

Concerning the section 1 issues, PC contends these weekend switching charges are just and reasonable in view of the additional expense allegedly involved in providing this service. However, both GM and GMI insist that weekend switching service is not a service in addition to the line-haul transportation and thus when a carrier applies weekend switching charges this is allegedly charging twice for the same service in violation of section 1, citing *Los Angeles Switching Case,* 234 U.S. 294 (1914).

GM argues that PC's practice of assessing weekend switching charges at certain points and not others where the same tariff applies is a violation of section 3(1), citing *Atchison Board of Trade* v. *Atchison, T. & S.F. Ry. Co.,* 305 I.C.C. 637 (1958) PC denies that this allegation has any relevance because, with reference to the considered shipments, there is no showing that GM has suffered any injury due to this practice.

EXPEDITED SWITCHING

As noted, certain shipments were charged for expedited switching during the 5-day week. These switching charges were based on item 12420[5] of the above-described switching tariff as follows.

Item 12420:

> When patron request placement of either loaded or empty cars prior to the time these cars can be placed at the ordinary operating convenience of the PC, the PC will assess a charge of RB 8500 for each cut of not more than five (5) cars moved from one location to one other location. This charge will be in addition to all other charges.
>
> The PC will perform this service only if it can do so without undue interruption of normal operations.
>
> This charge is applicable only on traffic that has had or will receive a road-haul.

Item 12420 applies only to traffic switched at Lansing; and GM has paid additional switching charges only when the cars were moved from the C&O interchange on the basis that such service was beyond that covered by the line-haul rates. It was established because no tariff items covered the expedited switching service being requested by Oldsmobile at Lansing beginning in early 1968. A witness for PC states that PC would be requested to make a special switching run to the C&O interchange, pick up the cars, and deliver them immediately to the Oldsmobile plant rather than wait delivery when the next regular switching crew went into service in the normal course of business. PC stresses how much these normal operations are disrupted whenever GM requests expedited switching service.

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[5] This item first became effective October 22, 1968, numbered as item 2917, supplement 193, in Penn Central Tariff 20-C, I.C.C. 1795 (NYC Series).

Monday through Friday, PC operates with 13 regular crews, 6 crews on the first shift, 4 crews on the second shift, and 3 crews on the third shift. The first operates 2 crews at 7 a.m., 1 crew at 7:30 a.m., and 3 crews at 8 a.m. The second operates 1 crew at 3 p.m. and 3 at 4 p.m. The third operates 1 crew at 10:30 p.m. and 2 at 11:59 p.m.

Each day there are approximately 75 railcars pulled and 75 rail cars placed at the 3 Oldsmobile plants. The normal weekday switching requirements for these plants include a daily switch once on each of the three shifts, and twice on track 11 on the second shift. Oldsmobile provides PC with a list of the loaded railcars it wants placed for each shift by telephone calls at 8 a.m., 2 p.m., and 9:30 p.m. Each call from Oldsmobile will also designate the specific tracks to be switched and the time of day for the switch. After a switch list is made out, the crews get the specified railcars from Saginaw Yard, then they go to the New Yard for additional cars, then to the plant. New Yard is a direct support yard for Oldsmobile plant 1 located nearby, and only cars for Oldsmobile are kept there. Only on rare occasions are all cars called for in one shift located in that one yard. Serving the Oldsmobile plant in this manner takes an entire day for PC crews. Very seldom do the crews on the Oldsmobile job do any other work in Lansing.

After Oldsmobile has placed its initial call stating its switching needs for the forthcoming shift, it occasionally telephones to add or delete cars. The original switch lists having been made out and the crews having commenced setting out the cars on the original list, PC must now prepare a new list, cars have to be shifted around, and sometimes new cars must be added or others cut out and returned to the yard. PC's trainmaster states that whenever a request is made for expedited switching service, "the performance of which is disruptive to the operation of the railroad's work plan and normal switching activity, it is treated as a request for special switching service. These special switch charges are assessed under item 12420 of Conrail Tariff 40109, I.C.C. 155 (PC Series)." The substance of this tariff item has been in effect since 1968. PC did not begin issuing balance due bills under the item until 1973.

PC introduced the following evidence of the normal switching practices at the Fisher Body Plant in Lansing, and of the allegedly disruptive influence of expedited switching. Fisher's normal switching requirements from Monday through Friday are set forth in a printed schedule of timed switches. On the third shift, Fisher provides PC with information by 11:45 p.m. as to which cars they will need and what tracks are to be switched. The plant is available (open) for switching at 3:30 a.m., and the switch must be completed by 6:30 a.m. for track 8 and the whole plant by 6:45 a.m. On the second shift, Fisher provides its switching order as follows: 8 a.m. for the 11:15 a.m. switch (tracks available at 10:45); 8:30 a.m. for the 11:30 a.m. switch (tracks available at 11 a.m.); 8:30 a.m. for the 12:30 p.m. switch (tracks available at 12 noon); 12 noon for the 5 p.m. switch (tracks available at 4:15 p.m.); and 12 noon for the 5:15 p.m. switch (tracks available at 4:30 p.m.). On the first shift, the plant provides its switching orders at 6:30 p.m. for its 9:45 p.m., 10 p.m., and 10:30 p.m. switches, with the tracks being available at 9:15 p.m., 9:30 p.m., and 10 p.m., respectively. The train crews work a full 8 hours for Fisher on the third shift, 8 hours plus overtime each day on the first shift, and 4 hours on the second shift. The regular crew on the second shift will use the first part of its workday to help out at the Oldsmobile plant. During the course of an average weekday, PC train crews working these three shifts will place 70 cars, and pull 70 cars.

In addition to its normal switching requirements during the 5-day week, Fisher will frequently request a special switch of from 1 to 5 cars. There are times when these requests are made as often as once a day. About 75 percent of these requests are for cars to be added to the switch orders given earlier in the day, or to have the carrier spot (deliver) a car immediately upon its arrival in Lansing. Special crews are required to perform this expedited switching, because the regular crews normally cannot handle the additional volume.

The remaining 25 percent of Fisher's requests are for the pick up, switching, and placing of cars which arrive on the lines of the C&O. Ordinarily, each morning Fisher advises PC by telephone which railcars it wants delivered by the second shift. These cars are picked up by PC from 10 to 12 a.m. by crews working regularly in the C&O interchange service. By 2 p.m., Fisher advises which of these cars it will need by 6 a.m. the next morning. However, sometimes special crews must be used to avoid disruption of the described time-switch requirements of the Fisher plant. Whenever possible, another regular crew is taken from its own assigned work to perform this special service. Since the location of the requested cars, and the engine and crew chosen to do the work vary from day to day, the time required to perform this type of special switching service varies greatly. The required time varies from 1.5 to 4 hours, and the PC trainmaster states that it "results in a significant disruption of our normal work schedules."

Fisher's traffic manager at Lansing points out two contradictions in PC's argument. First, he notes PC's contention that it applies the switching charge only when the requested service is disruptive to the railroads' normal switching service. Nevertheless, he points to 58 of the considered shipments where, despite the fact that Fisher's request was out-of-cycle, PC managed to place the cars along with the others in a regularly scheduled movement and thus the requested switching service did not disrupt normal operations. Also he notes that, at one point in PC's statement, it contends that expedited switching charges are due only when the cars are brought in from the C&O interchange. Nevertheless, on several of the considered shipments PC has applied expedited switching charges on cars switched from the nearby Saginaw and New Yards.

PC introduced a cost study intended to show the additional expense involved when it provides weekend switching service, and expedited switching service.

DISCUSSION AND CONCLUSIONS

Weekend Switching.—Historically, the Nation's railroads have made no extra charge for weekend switching. As one of the witnesses for PC states, the normal workweek exceeded 5 days up until the end of World War II. Like switching service during the 5-day workweek, weekend switching has been considered as part of the origin or destination switching service traditionally included under the line-haul rates. The railroads have not only provided service 7 days a week, but also demurrage, storage, and other accessorial charges have traditionally applied on Saturdays and Sundays like any other day of the week. The instant record shows that GM received weekend swtiching service from PC without reference to an additional switching charge prior to 1972. The issue here, is whether the considered weekend switching service is beyond the carrier's ordinary operating convenience as defined in the rules tariff and constitutes "special movements at terminal points". As noted, the rules tariff provides that no additional charge will be made where the switches are not in excess of the carrier's "ordinary operating convenience" as defined in note 2. The substance of tariff note 2 was first approved by the Commission *Carrier Switching at Industrial Plants in the East,* 294 I.C.C. 159 (1955). Various parts of that note, as brought forward in subsequent tariffs, have been defined and interpreted in later decisions of the Commission, such as *Terminal Allowance, Copperweld Steel Co., Warren, Ohio,* 298 I.C.C. 629 (1956), and *Ford Motor Company* v. *Erie Lackawanna Ry. Co.* 353 I.C.C. 411 (1977), but do not deal with the precise issue here.

The most significant fact about note 2 in the present context, is the absence not only of the term "weekend" but also the term "weekday". Instead, the only reference to any specific period of time appears in the following sentence:

> Ordinarily it (ordinary operating convenience) contemplates only one switch a day except when additional switches are made by the carrier in its own or the public interest, as distinguished from the industry's interest, to secure the prompt release of equipment or facilities, or when necessitated by the volume of traffic.

A fair interpretation of the phrase "one switch a day" is that it means any day of the week including Saturday or Sunday. PC correctly points out that the above-quoted phrase does not make 7-day-a-week switching service mandatory at all switching stations on the railroad. It notes that there are, on its lines, certain low-traffic stations where only biweekly or triweekly switching is necessary. This argument is beside the point, and does not answer the question of whether weekend switching, when performed, is beyond the carrier's ordinary operating convenience thereby making applicable a switching charge in addition to the line-haul rate. We find not a single word or phrase in note 2 to support PC's interpretation that it excludes weekend switching from the carrier's ordinary operating convenience. The principal import of note 2 is that more than one switch a day is justified in the carrier's or the public's interest "to secure the prompt release of equipment or facilities, or when necessitated by the volume of traffic." Here again, it is significant that there is no reference to any particular day of the week, and the phrase "one switch a day" is unclear in this respect. This Commission has frequently held that when a word or phrase is ambiguous or unclear, the tariff must be construed against the carrier in favor of the shipper. See *Edwards Land & Timber Co.* v. *Gulf, M. & N. R. Co.,* 201 I.C.C. 265, 267 (1934), *General Motor*

Corp. v. *Hanson Motor Exp., Inc.*, 54 M.C.C. 9, 12 (1952), and *Paraffine Companies* v. *S. P. Co.*, 128 I.C.C. 421, 423 (1927). Accordingly, we find that weekend switching, as such, is not beyond the carrier's ordinary operating convenience as defined in the rules tariff.

We find little to support PC's contention that the considered weekend switching service constitutes "special movements at terminal points" making applicable switching charges in addition to the line-haul rates. These items describe special movements as being due to various excessive physical conditions, referring specifically to excessive weight or a high center of gravity. Then follows the phrase "or other conditions not permitting normal operation," which we interpret as referring primarily, if not exclusively, to other physical conditions of the cars or lading being switched which necessitate an abnormal operation. Here again, it is significant that the tariff items make no mention of either weekend or weekday switching. PC's own evidence indicates that weekend switching, once it is begun, is a normal operation and is being regularly conducted for other shippers without additional compensation being demanded by the carrier. While we are told that the railroad does provide this service "under appropriate circumstances", nowhere does the record disclose what circumstances make free service "appropriate." If PC has objective criteria, such as the number of cars handled or the amount of revenue generated, which it applies to make this determination, we are not informed of them; and, more importantly, they are not in the tariff. Moreover, the other carriers participating in the rules tariff do not make a charge for weekend switching at other GM plants, and this is further, although weak, evidence that PC is placing an unwarranted construction on that tariff. We are impressed with the fact that PC's trainmasters at both Lansing and Muncie stated that the switching service performed on Saturday and Sunday was basically of the same type as that performed during the week. PC stresses that certain members of its weekend switching crew must, on occasion, travel some distance to Lansing to perform their duties. Also, PC points out that it costs more to provide weekend switching, because it must pay crews time-and-a-half for overtime. However, these factors are no indication that the switching operation itself is abnormal. PC should, if it believes that it is not adequately compensated, publish appropriate charges for weekend switching service. Cf. *Shell Oil Co.* v. *Louisiana & Arkansas Ry. Co.* 355 I.C.C. 627. We find that item 12410 of

Conrail Switching Tariff 40109, *supra,* and rule 10, item 310, of Conrail Special Train Tariff 40205-F, *supra,* do not apply to weekend switching per se and thus the charges sought to be collected by PC were and are inapplicable.

Expedited Switching.—As noted, all of PC's charges for expedited switching service are based on item 12420 of the switching tariff. We find this tariff item ambiguous, particularly because it contains an inherent contradiction. The first paragraph of the item provides that an additional charge will be made when the shipper requests placement of either loaded or empty cars prior to the time these cars can be placed "at the ordinary operating convenience of the PC ***." Nevertheless, the second paragraph of item 12420 states that the PC will perform this expedited switching service "only if it can do so without undue interruptions of normal operations." As stated, much of PC's evidence is intended to show the extent to which expedited switching service requires it to place the shipper's cars at times which are not at PC's ordinary operating convenience. After setting forth many details in this respect, PC's witness summarizes this evidence by stating that it is disruptive to the operation of the railroad's work plan and normal switching activity. If true, it is a flat contradition of item 12420 which, as noted above, provides in the second paragraph that PC will perform expedited switching service only if it can do so without undue interruptions of normal operations. This phrase also conflicts with note 2 of the rule tariff which defines the time when switching under the line-haul rates will be performed as "the time selected by the carrier when it is most advantageous to carrier, in relation to its coordinated and harmonious switching activities ***." In other words, if the switching in the words of item 12420 can be performed without undue interruptions of normal operations, why is it not also a "coordinated and harmonious" switching activity? These contradictions in the tariffs cause ambiguity, and a reasonable doubt arises as to the meaning of item 12420 which must be resolved against the carrier and in favor of the shipper. We thus find that the switching charges based on item 12420 of Conrail Switching Tafiff 40109, I.C.C. 155 (PC series), and previous issues thereof, were and are inapplicable.

In summary, we find that the charges which PC seeks to collect in the court action are inapplicable.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is Ordered:

This proceeding is discontinued.

No. 35939

MOTOR VEHICLES, TRUCKAWAY SERVICE, FROM AND TO POINTS IN THE UNITED STATES

Decision and Order

Leave to file a petition for administrative review seeking reconsideration of a decision and order of Review Board Number 4, dated May 11, 1976, was granted in an order dated August 31, 1977. Protestant Volkswagen of America, Inc., had filed its petition for reconsideration, together with its petition for leave to file, on August 8, 1977. Respondents filed their reply on August 24, 1977.

Protestant alleges that several errors were committed involving questions of burden of proof, rule 7 of the Commission's General Rules of Practice, evidentiary competence, the propriety of rebuttal evidence, and the opportunity for cross-examination.

Protestant is correct that the motor carrier participating in the tariffs are the respondents. ***Rubber Accelerators, Wyandotte, Mich., to Louisville***, 66 M.C.C. 575 (1956), and ***Machinery, Iowa Farm to Market Carriers***, 303 I.C.C. 317 (1958). The carriers have the burden of proof under section 216(g) of the Interstate Commerce Act and were designated the respondents in this proceeding by an order dated December 7, 1973. Any reference by the parties, the Administrative Law Judge or the review board to the tariff bureau as a respondent were incorrect.

However, the tariff bureau was appropriately present in this proceedings as a supporting party. Such parties were allowed to file statements of fact by an order dated December 12, 1973.

The tariff bureau did not violate rule 7 of the Commission's General Rules of Practice by appearing in this proceeding. ***Iron or Steel, Geneva, Utah to Oregon and Washington***, 304 I.C.C. 597 (1958). In the instant proceeding the bureau was represented by a qualified practitioner and its own activities were limited to presenting evidence.

Employee of a tariff bureau may present evidence in rate proceedings. ***Aluminum from Badin, N.C. to Campbell, Ohio***, 66 M.C.C. 399 (1956). The statements presented by the bureau's traffic manager and the cost consultant were properly verified. Both witnesses had the requisite knowledge. Knowledge can be implicit in the position held by the witness. ***Illinois-California Exp.***

Inc.—Control and Merger, 75 M.C.C. 671 (1959). The traffic manager's statement indicated that knowledge of rate and revenue comparisons was implicit in his position. Knowledge can also be based on survey—the technique employed by the cost consultant. *Paper Wrappers from St. Louis, Mo., to Louisville, Ky.*, 63 M.C.C. 422 (1955).

The replies to protestant's statement were proper rebuttal to issues and criticisms developed by protestant. Questions of the propriety of rebuttal evidence are mainly questions of the weight to be given that evidence. *General Increase, July 1972, Eastern Central Terr.*, 343 I.C.C. 1 (1973). Although some weight may have been given to evidence presented in reply that was not presented at the initial stage, there was other substantial evidence to support the decision.

Cross-examination is only required by section 556(d) of the Administrative Procedure Act when it is necessary to further the resolution of disputed facts. The written statements of modified procedure allowed adequate resolution of the issues in this proceeding. The Administrative Law Judge was able to determine the validity of the evidence without the necessity for cross-examination.

Substantial evidence exists to support the decision and order of the review board. Sufficient reasons have not been presented to require reconsideration of that decision.

It is ordered:

(1) That the petition for reconsideration is denied.

Decided December 21, 1977.

The statement of facts, conclusions, and finding decided November 19, 1974, of Administrative Law Judge Richard A. White, follows:

Assailed percentage increase found just and reasonable but the Mackinac Bridge crossing charges found not shown to be just and reasonable. Just and reasonable bridge crossing charge found to be not more than $5.50 for a five-axle tractor trailer combination. Schedules ordered canceled without prejudice to the filing of tariffs in conformity with the view express herein and the findings made.

Walter N. Bieneman for respondent.
Martin J. Leavitt, Ronald C. Nesmith, and *Robert A. Sullivan* for protestant.

By schedules which became effective December 11, 1973, respondent Automobile Transporters Tariff Bureau, Inc. (ATTB), published what it describes as a 5-percent increase in two tariffs. The increase in tariff No. 164-H, MF-I.C.C. No. 287 applies on imported automobiles transported from named ports and preparation centers along the Atlantic seaboard (from Baltimore, Md., to Boston, Mass.), to points in 25 States and the District of Columbia. Thirteen motor carriers participate in the tariff. The increase in tariff No. 165-I, MF-I.C.C. 288 applies on imported vehicles moving from various ex-water and ex-rail origins in the Great Lakes area of the Midwest to points in 31 States and the District of Columbia. Fourteen carriers join in the tariff. The increases were protested by Volkswagen of America, Inc., and its subsidiaries, and though not suspended were made the subject of an investigation.

The Commission directed that the proceeding be handled under the modified procedure which provides for the parties to submit their evidence in the form of verified statements. Statements were submitted by respondent tariff bureau and by a cost consultant whose study purports to show that the assailed rates do not exceed a reasonable level. A verified statement was submitted by an official of the named protestant and by two consultants, one of whom speaks mainly to the lawfulness of incorporating the toll charges into the line-haul rates, while the other offered a cost study designed to establish that the assailed rates are unreasonably high. Reply verified statements were filed by respondent tariff bureau and three of the carriers participating in the assailed publications, namely M & G Convoy, Inc., Nu-Car Carriers, Inc., and F. J. Boutell Driveaway, Co., Inc. and by the cost consultant. Argument memoranda were filed by counsel representing the parties. Protestants moved to strike portions of the original and reply statement filed by respondent tariff bureau, portions of the reply statement submitted by the cost consultant as well as the reply statements in their entirety offered by the three participating carriers. Respondent answered the motions to strike, and in turn moved to strike portions of the statements filed by protestant's official and by the consultant who testified regarding the lawfulness of incorporating the toll charges into the line-haul rates.

Each of the assailed publications contain four different groups or columns of rates. The columns A and B rates apply on vehicles weighing under 2,500 pounds. The column A rates are higher and require a minimum load of six vehicles on a truck, while the column B rates require a minimum of seven vehicles. The column C rates apply on vehicles weighing between 2,500 and 3,000 pounds while those in column D extend to vehicles weighing over 3,000 pounds. Both the column C and D rates require minimum loads of six vehicles per truck. The column C rates are higher than either the column A or B rates while those in column D are higher than those in column C. Protestant's concern relates in the main to the rates in columns A and B inasmuch as these rates apply on vehicles weighing less than 2,500 pounds. Substantially all the Volkswagen traffic moves under the column B, seven-vehicle minimum rates.

RESPONDENT'S EVIDENCE

Respondent relies on rate comparisons and a cost study in support of its belief that the assailed increases are just and reasonable. This section of the report will in the main discuss the rate comparisons and the incorporation of certain accessorial charges into the line-haul rates. The cost evidence will be treated in a separate section of the report.

For some years the predecessor publications of the assailed tariffs contained provisions described as "Toll Charges" whereby a designated charge was added to the line-haul rate. In the assailed publications these charges have been incorporated into the line-haul rates. Respondent submits that this does result in an increase in the total charge which the shipper must pay but merely alters the way the charge is computed. For example, the prior publication in the tariff No. 164 series carried a column A rate of $59.60 per vehicle, applicable to a load of six vehicles, from Baltimore and Dundalk, Md., to Hartford, Conn. The 5-percent increase is said to bring the charge to $62.10. The toll charge on a six-vehicle load to Connecticut is $28.20 or $4.70 per vehicle. Application of the latter charge to the rate of $62.10 produces a total figure of $66.80 which is the rate under investigation. With the publication of the assailed schedules the toll charges in both tariffs were canceled except as hereinafter noted. Respondent submits that toll charges at one time applied on the movement of domestic automobiles but were eliminated in the same fashion as was accomplished in the assailed schedules. The change will expedite the preparation and improve the accuracy of freight bills and will make it easier for the shipper to verify the bills.

Respondent tariff bureau submits that automobile transporters depend mainly on the traffic tendered by the four major domestic producers to sustain their operations. The rates charged these accounts are watched closely and they are constantly being increased to reflect the increased cost of conducting business. In contrast, the transportation of imported automobiles represents only a small percentage of the domestic volume and the level of these rates has not been watched as closely with the result that rate increases on imported traffic have generally lagged in relation to the increases applied on movements of domestic automobiles. About the time the assailed publications were filed respondent tariff bureau received information from its member that labor costs increased about 7.2 percent effective September 1, 1973, and that there had been sharp increases in fuel, truck parts, pension and welfare payments, office salaries, and Social Security Taxes.

Nu-Car Carriers, Inc., in its tariff series 40 publishes rates on automobiles from Edison Township, Middlesex County, N.J. There is no provision specifying a minimum number of vehicles to be loaded on a truck, nor is there a charge for drop-off service or circuity. The cost of these services was taken into account in establishing the rate level. A single per vehicle rate applies from origin to destination regardless of the circuity entailed by the truck in making delivery. Such a method of publication affords the shipper a ready means of checking the correctness of the charge being assessed. The only vehicles transported under this tariff are Pinto automobiles produced by the Ford Motor Company at or near Edison. The vehicles weigh between 2,344 and 2,554 pounds and about 2,400 units move South each month. During the first 9 months of 1973, the average load was 7.4 vehicles per truck. Within recent months the average increased to 7.9 per truck. Respondent participates in the movement of Volkswagens pursuant to the column B rates in tariff 164-H. An average load is comprised of seven vehicles. The volume of import traffic moving north from Baltimore is much less than the southbound movement out of Edison. About 100 imported vehicles move from Baltimore north to New Jersey each month.

Comparison is made of the tariff 40 rates from Edison, as of June 5, 1974, including a fuel surcharge of 2 percent, to 12 points in Maryland, Delaware, and Virginia with the assailed rates including a 4-percent fuel surcharge from Baltimore to 12 points in

New Jersey, Pennsylvania, and New York for comparable distances. The Edison rates for trips ranging from 109 to 226 miles produce from $286 to $481 per truckload and from $2.13 to $2.62 per mile. For the 158-mile trip from Edison to Baltimore the revenues are $368 per truck and $2.33 per mile. The assailed rates for approximately the same distances generate truckload revenue ranging from $169 to $378, and revenue per mile of from $1.57 to $1.91. Thus on the 157-mile trip from Baltimore to Sommerville, N.J., the revenues are $264 per truck and $1.68 per mile. The advantage the assailed tariff affords shippers persists even when the $5.25 per vehicle charge for split delivery is added to the line-haul rate.

The above comparisons are predicated on the assumption that seven vehicles comprise a truckload. To the extent the load factor on movements from Edison exceeds seven vehicles the earnings are greater than those depicted. Though tariff series 40 does not require a minimum number of vehicles be loaded on a truck, the great volume of traffic handled out of Edison enables respondent to load its vehicles in the manner deemed most efficient.

Respondent M & G Convoy, Inc., participates in the movement of domestic automobile traffic from the Chrysler plant at Newark, Del., pursuant to the terms of ATTB Tariff No. 134. This tariff contains a five-vehicle truckload minimum. During the second quarter of 1974, 29,828 vehicles were moved from Newark. Import tarffic is handled pursuant to the terms of E. J. Bannon's Tariff No. 4 and during the second quarter of 1974, 871 imported Chrysler vehicles with an average weight of 2,478 pounds and a load ratio of 6.93 vehicles per truck were handled. A minimum of six vehicles is required to comprise a truckload and each vehicle is subject to a toll charge in addition to the line-haul rate. Because of the large volume of traffic handled for Chrysler no problem is experienced in making up full truckloads to one destination or several closely grouped destinations. In such circumstances respondent submits there is no need for a truckload minimum. The cost of providing split delivery service is one of the elements taken into account in setting the level of the rates.

Under Bannon Tariff No. 4, which covers imported Chrysler vehicles from Japan received at Baltimore, respondent is securing about $9 per vehicle more revenue than it does on Volkswagen traffic handled under tariff No. 164-H at the seven-vehicle rate. An average of 3.5 drops per truckload are extended to the Chrysler imported traffic. Assuming the Volkswagen traffic required similar drop-off delivery service, the $5.25 charge per drop-off in the assailed publication would generate additional revenue of $18.37 per load or $2.65 per vehicle based on an average load of 6.93 vehicles. Thus even when the tariff No. 164-H, drop-off charge is taken into account, shippers using the aforementioned tariff enjoy an advantage of more than $6 per vehicle.

Recently with the decline in sales volume, protestant is no longer always shipping in truckload quantities to single destinations. During the week ending May 31, 1974, on Volkswagen traffic moving through Port Newark, N.J., M & G handled 95 single destination loads, 41 two-destination loads, 4 three-destination loads, 1 four-destination load, and two loads which entailed split pickups. For the week ended June 8, 1974, it handled 100 loads moving to single destinations, 35 going to two destinations, 7 three-destination loads, and 1 split pickup. Thus protestant is no longer consistently offering full trailerloads to single destinations.

Respondent also participates in the movement of Chrysler traffic from Detroit to the East pursuant to Bannon Tariff No. 2-L. During the first 6 months of 1974, a total of 46,146 vehicles were transported with an average of 6.95 units loaded on a truck. The tariff requires no truckload minimum and there is no charge for stop-off delivery service. Reference is made to 11 typical movements during April and May 1974 where the same driver and equipment which moved a load from Detroit to the East returned from Baltimore with a load to the West, or vice versa. The 11 eastbound movements aggregated 75 vehicles which moved a total of 5,263 miles producing revenue of $7,737 or an average of $1.47 per mile. The companion westbound movements (handled under assailed tariff No. 164-H) comprised 76 vehicles which moved a total of 6,523 miles producing aggregate revenue of $8,392 or $1.28 per mile. During the period studied the 4-percent fuel surcharge was in effect in tariff No. 164-H on the westbound movement, but the corresponding 3-percent increase on the eastbound movement did not become effective until the end of April with the result that three of the eastbound moves which occurred in April, prior to the increase, were not subject to the surcharge.

Each of the 11 eastbound movements entailed one or more drop-off deliveries for a total of 28 drop-offs. All the westbound moves comprised full loads to single destinations. Respondent shows that had the westbound traffic require drop-off service corresponding to the eastbound, additional revenue of $147 would have been generated causing the average revenue per mile to increase to $1.30, but still 17 cents less than that realized from the eastbound movements under tariff No. 2-L. A comparison of 10 eastbound movements from Detroit under tariff No. 2-L and a corresponding number of westbound movements from Port Newark pursuant to tariff No. 164-H, during May and June 1974, for approximately equal distances, shows that the eastbound loads comprised a total of 72 vehicles which aggregated 2,393 miles producing revenue of $4,633, while the 10 westbound moves comprised 72 vehicles which moved an aggregate of 2,388 miles bringing in revenue of $3,946. The average revenue per eastbound move was $463 or $1.93 per loaded mile and $395 westbound or $1.65 per loaded mile. Five of the movements from Detroit entailed a total of 10 drop-off deliveries. Three of the movements from Port Newark entailed a total of six drop-off deliveries. Extending to the westbound movements the difference of four drop-offs at $5.25 each produces additional revenue of $21 which increases the revenue per mile to $1.66.

F. J. Boutell Driveway Co., Inc., publishes rates in its tariff No. 36 applicable at Baltimore on automobiles produced at named points in Belgium, Germany, and Japan where General Motors maintains plants. The principal import handled by respondent is the Opel which like the Volkswagen weighs less than 2,500 pounds. The rates in this tariff are not subject to a truckload minimum but respondent has no difficulty in forming loads of seven vehicles and it consistently handles such loads the same as it does on Volkswagen traffic moving pursuant to tariff No. 164-H. Respondent is tendered a substantial volume of General Motors domestic and import traffic and is free to assemble its loads in the way it deems to be most efficient with a given load going to one common destination or to several destinations where split delivery can be efficiently performed.

Comparison is made of the assailed seven-vehicle minimum rates with the tariff No. 36 rates including toll, from Baltimore, Md., to 14 points in Maryland, New Jersey, and Pennsylvania. The rates in the tariff under investigation range from $8.55 to $9.65 less per vehicle than do the compared rates. On a load of seven vehicles protestant's advantage ranges from $61.95 to $68.05. The compared rates are those in effect prior to December 21, 1973. Effective the latter date they were increased about 5 percent. The Boutell tariff unlike tariff No. 164-H does not impose a split delivery charge of $5.25 per vehicle. However even when this charge is taken into account shippers using the assailed tariff have a clear though less pronounced advantage.

Respondent tariff bureau publishes rates in tariff No. 176 on automobiles shipped from a railhead at Norristown, Pa. The tariff contains no truckload minimum. American Motors vehicles including the Gremlin are handled under this tariff. Comparison of these rates with the assailed seven-vehicle rates from Baltimore, for comparable distances, shows that the advantage enjoyed by users of the latter tariff range from $5.30 per vehicle for a trip of about 98 miles to $7.80 for one of 178 miles. On the basis of seven carload the advantage of the assailed tariff ranges from $37.10 to $54.60.

Tariff No. 176 also contains rates between Madison, Ill., and points in Illinois, Kentucky, and Missouri. American Motors vehicles including the Gremlin move under compared rates. There is no requirement for a minimum number of vehicles to be loaded on a truck. Comparison of the rates from Madison to four points in Illinois and Missouri with the assailed seven-vehicle rates in tariff No. 165-I from Chicago, Ill., to four points in Illinois, Indiana, and Iowa, for comparable distances, shows that the tariff No. 165-I rates have an advantage which depending on distance ranges from $2.05 to $6.80 per vehicle. Computed on a seven-vehicle truckload basis the difference ranges from $14.35 to $47.60.

Respondent tariff bureau publishes rates on domestic automobiles in tariff No. 116-U, from Kenosha, Wis. Comparison of the assailed tariff No. 165-I seven-vehicle rates from Chicago to five points in Wisconsin, Indiana, and Ohio, with the rates in tariff No. 116-U from Kenosha, to five points in Illinois, for comparable distances, shows that the domestic traffic brings in revenue per trailer-mile ranging from a high of $3.38 for distances of about 56 miles to $1.57 for a journey of about 218 miles, whereas the assailed rates produce revenue in a range of from $2.86 to $1.55. Traffic moving from Kenosha consists of American Motors vehicles including Gremlins. The compared rates sustained a 3-percent increase effective April 4, 1974.

Respondent concludes on the basis of the above comparisons that the rates on Volkswagens as now published are substantially below the charges applicable on competitive domestic traffic. To bring the assailed rates to a level comparable to those prevailing on domestic vehicles would require an increase of between 10 and 25 percent. This is true even though the toll charge is incorporated into the line-haul rates. Respondent concedes that most of the compared tariffs contain no requirement that the shipper tender any given number of vehicles at one time whereas, in contrast, the assailed publications require that the shipper tender six or seven vehicles at one time, but it emphasizes that the compared rates, for the most part, cover domestic shipments and the volume of traffic tendered is so large that it is unnecessary to publish a minimum load restriction. Carriers are thereby free to make up truckloads and operate their vehicles in the way they deem to be most efficient.

PROTESTANT'S EVIDENCE

Volkswagen objects to incorporation of the "Toll Charge" into the line-haul rates. It traces the charge back several years when it appeared under other guises. Thus on August 1, 1970, the predecessor publications contained a charge captioned "Toll and Marshalling Charge" which by its terms applied on all vehicles transported by member carriers of respondent. The charge was $1.50 a vehicle and was in addition to certain specifically identified toll charges described in the publications. Protestant submits that no services justifying the charge were provided. On September 17, 1970, in supplement 3 to tariff No. 164-D, the aforementioned charge was canceled and an "Origin Terminal Handling Charge" of $1.50 per vehicle was published. The charge was designated as being imposed for "*** the preliminary preparation rendered at origin point prior to the actual handling of the vehicle." At the same time the specifically identified toll charges were increased. A similar change was effective September 17, 1970, in supplement 1 to tariff No. 165-E. Subsequently on May 7, 1971, in tariff No. 165 series and June 10, 1971, in tariff No. 164 series the "Origin Terminal Handling Charges" were deleted and in their place a toll charge which either increased the existing charges by $1.50, or instituted a new charge of $1.50 a vehicle applicable on each vehicle handled became effective. The increase in the tariff No. 165 series was not denoted by the appropriate symbol as being an increase.

On August 16, 1973, protestant informed respondent tariff bureau that the $1.50 charge imposed since August 1, 1970, had been improperly levied in that its vehicles had not been extended by marshalling or special handling services and that the vast majority of the units were transported over routes which did not require payment of tolls. On September 18, 1973, respondent tariff bureau proposed to its members that the toll charge be incorporated into the line-haul rates. Subsequently the change was approved and the modification was accomplished in the publications whose lawfulness is here in issue.

On or about March 17, 1974, protestant filed a lawsuit in the United States District Court, Eastern District of Michigan, Southern Division, challenging the legality of the toll charge. Respondent is said to have learned of the suit much earlier and had notice of the contemplated action on or about August 16, 1973, when it was advised of protestant's position on the subject. Protestant believes that the incorporation of the toll charges into the line-haul rates was a maneuver designed to thwart the effect of the lawsuit. Thus under no circumstances can the incorporation of the toll charge into line-haul rates be justified as a tariff simplification measure designed to ease the burden on carriers and shippers of accurately computing charges. Protestant submits that the effect of the change is to assure that the toll charge, which is of dubious propriety and involved in a Federal lawsuit, is applied in an unjust, unreasonable, and illegal manner to each and every vehicle regardless of whether the vehicle receives the service for which the charge is imposed. It does not object to payment of toll charges in instances where shipments handled for its account actually incur toll expenses. It knows of no instance where the Commission has approved application of toll charges regardless of whether or not toll expenses are actually incurred. Inclusion of a toll charge in the line-haul rate is said to be improper because it leads to distortion of rates. Future general revenue increases, will be based on a percentage of the line-haul rates, the latter including a toll charge element which may not have incurred a cost increase.

Protestant raises several other issues with respect to various aspects of the charges referred to in the foregoing account. First, it endeavored to determine whether the cancellation of the "Toll and Marshalling Charge" and the "Origin Terminal Handling Charge" was associated with any changes in operations provided by the carriers at points where shipments originate. On or about May 31, 1974, protestant's consultant visited Dundalk Marine Terminal, Md., where he spoke with the manager of the terminal and seven drivers of whom five had been hauling vehicles since at least May 1970. All the persons interviewed indicated that over the years there had been no change in the services provided by the carriers at origin.

Second, protestant questions whether the increase in toll charges over the years is related to corresponding increases in toll payments. A study was made of the toll rates for highways, bridges, and tunnels in 1970 as compared with 1973. Of the 24 highways studied, only 4 or 17 percent experienced increases; on 19 the tolls remained unchanged, while on one there was a decrease. The average increase over the period is less than 3 cents per vehicle assuming a seven-vehicle load. Of the 33 bridges or tunnels studied, the tolls on five increased, those on 27 were unchanged, while on one there was a reduction. The average increase per vehicle was about 9 cents. The seven carriers which supplied data for respondents' cost study reported transporting 409,593 vehicles in 1973 and to making toll payments of $453,582 or an average of $1.11 per vehicle. In contrast the predecessor publications in effect prior to December 11, 1973, provided for the payment of toll charges several times greater than the average 1973 toll expense. This establishes that the increase in toll charges over the years was not predicated on an increase in toll payments incurred by respondents, but rather was a substitute for the canceled "Toll and Marshalling Charge" and the "Origin Terminal Handling Charge."

Third, protestant disputes respondent's explanation that the practice of incorporating toll charges into the line-haul rates as was done in the assailed publications is patterned on the similar practice adopted several years ago with respect to tariffs covering domestic vehicle movements. Concerning the 1967 modification of tariff No. 10-0 covering movements from Lansing, Mich., protestant submits that toll charges were incorporated into the line-haul rates only with respect to those rates which in the prior tariff were specifically subject to toll charges. The same is true of the September 1965 revision of tariff No. 558 applicable on movements from Pontiac, Mich.

Finally reference is made to a certain anomaly in the way the assailed tariffs treat bridge crossing charges. Tariff No. 165-I, item 300 provides for a charge of $13 per truck or trailer crossing the Mackinac Bridge to reach the Upper Peninsula of Michigan. In contrast the charge is $11 in tariff No. 164-H. Protestant can perceive no reason for the difference. Since January 1, 1969, the one-way crossing charge for a five-axle truck is $5.50 or $11 for a round trip, but it is said to be unreasonable to charge the round trip toll when the trailer might return via the western route and not incur a toll expense.

Protestant also contends that the assailed publications and certain of their predecessors failed to comply with several rules in Tariff Circular MF No. 3. Rule 4(b) states:

> A tariff may provide rates from or to designated points by the addition or deduction of arbitraries or differentials from or to rates shown therein from or to base points, but provision for the addition or deduction of arbitraries or differentials shall be shown either in connection with the base rate or in a separate item which must specifically name the base point and clearly and definitely state the manner in which such arbitraries or differentials shall be applied.

Protestant believes it contrary to the terms of this rule to incorporate in a bridge or highway toll charge an amount to compensate carriers for unrelated services whether actually performed or not.

It seems clear that the purpose of the aforementioned rule is to require that the application of the arbitrary to the line-haul rates be made in a clear and definite manner so as to avoid confusion or uncertainty as to whether a particular rate is or is not subject to the arbitrary. Protestant does not contest whether the tariff makes the line-haul rates subject to the arbitrary (here a toll charge), but rather the reasonableness of the level of the arbitary and whether the shipments incurred the services which the arbitrary was ostensibly designed to cover. The toll charges were intended by the tariff maker to be applied to the line-haul rates and the tariff publications effected this intent in a manner which is consistent with the terms of rule 4(b). Accordingly there is no violation of Tariff Circular Rate 4(b).

Objection is also made to the fact that tariff No. 165-I fails to conform to certain of the provisions of rule 7B of the tariff circular. That rules states:

> All tariff publications shall indicate changes made in existing rates, charges, classifications, rules or other provisions by use of the following uniform symbols in connection with such change: (symbols omitted).
>
> Explanation of such symbols shall be provided (see rule 3(e)) in the publication in which they are used, and these symbols shall not be used for any other purpose.
>
> When a change of the same character is made in all or in substantially all rates in a tariff or supplement, or a page thereof, that fact and the nature of such change may be indicated in distinctive type at the top of the title page of such issue, or at the top of each page, as the case may be, in the following manner: "All rates in this issue are increases"; or "All rates on this page are reductions"; or there may be added, when appropriate, "except as otherwise provided in connection with particular rates." In complying with this paragraph, a bold-faced dot "." shall be used to symbolize a rate or other provision in which no change has been made and the proper symbol shall be used for the purpose of denoting any other change not indicated by the general statement referred to above.

The predecessor of tariff No. 165-I was No. 165-H and item 350 of the latter tariff, according to protestant, authorized application of toll charges. Tariff No. 165-I, the publication whose lawfulness is here in issue, contains no item 350, but despite this, rate sections 4 and 5 have a column headed ".Toll Charge (x)." Reference mark "x" is indicated as meaning "Refer to item 350." Under the aforementioned column there are toll charges in connection with some movements. Protestant directs attention to the obvious contradiction between the reference to item 350 in rate sections 4 and 5 but the failure to set forth the terms of the item in the rules section of the tariff. It also points to the anomaly of the bold faced dot ".", which means no change, alongside the failure to give meaning to the reference mark by publishing item 350. Finally there is the conflict of the bold faced dot "." against the publishing agent's justification for the tariff, dated October 25, 1973, wherein it was stated that for purposes of simplifying computation of freight charges the "Toll Charge" would be included in the line-haul rates and that all toll charges were canceled.

It seems obvious that tariff No. 165-I did contain a contradiction or ambiguity, but so far as the record shows protestant's rights as set forth in the Interstate Commerce Act were not abridged. The guidelines established over the years for resolving tariff disputes dictate that the toll charges listed in rate sections 4 and 5 under the column headed ". Toll Charge (x)" may not be applied because there was no corresponding rule in the tariff authorizing application of the toll charges. The confusion has been cleared through publication of tariff No. 165-J, MF-I.C.C. 344 and supplement 2 thereof with effective dates of August 29 and September 9, 1974, respectively. They are successor publications to tariff No. 165-I. It is not established that the tariff ambiguity of itself worked to protestant's disadvantage, but any toll charges collected by the members of respondent tariff bureau between December 11, 1973, and August 24-September 9, 1974, were imposed without tariff authority and therefore ought to be refunded. It is true with respect to tariff No 165 series that the May 7, 1971 increases in toll charges and the establishment of new toll charges where heretofore there had been none, was not denoted by an increase as required by rule 7B of the tariff circular, but the rules in the latter publication are designed to bring uniformity to tariff publishing practices. Infractions of the rules do not redound to the benefit of shippers unless the violations run counter to the Interstate Commerce Act, and there is no evidence or contention that this is so.

Concerning respondent's rate comparisons, protestant submits that the burden is on the carriers to justify the increase and comparisons with other tariffs cannot satisfy this obligation. Moreover, there are serious questions as to the relevancy of the comparisons inasmuch as the tariffs governing the movement of Volkswagens and the transportation conditions attaching to the movement of this traffic differ from the compared tariffs and the circumstances surrounding movements thereunder. The principal difference and the one stressed most frequently is that the assailed tariffs contain a six or seven-vehicle truckload minimum provision whereas the compared publications, with the exception of Bannon's tariff No. 4 and ATTB tariff No. 134, do not require that a minimum number of vehicles be loaded on a truck. Thus under most of the compared tariffs, respondent carriers could be required to transport a shipment as small as a single vehicle at the single vehicle rate. In contrast most Volkswagens are loaded seven on a truck and application of the column B rates is dependent on minimum loads of seven cars. The usual Volkswagen shipment comprises a seven-carload, and such a load is attainable even when one of the vehicles is a camper or bus type. If the load consists entirely of the classic Volkswagen "bug" eight such vehicles may be loaded on a truck. Another characteristic which distinguishes Volkswagen traffic is that invariably carriers are tendered full loads at origin and that the load moves to a single destination for delivery. The compared tariffs applicable on the movement of domestic automobiles allow the loading of full-size vehicles with the result that a fewer number of such vehicles can be loaded on a trailer than is the case with the seven or eight Volkswagens which the typical trailer can accommodate.

There are other ways in which the compared tariffs differ from those assailed. For example, Nu-Car Carriers Tariff series 40 permits more than one shipment for movement to more than one consignee or destination to be loaded on a single truck. Respondent's tariff Nos. 176 and 116 series allow up to 2 hours free time for stops enroute, while tariff No. 134 series contains a storage in transit provision. Objection is made to the M & G Convoy comparison of Bannon tariff No. 4, six-vehicle minimum rate, covering movements from Baltimore to 14 points in Maryland, New Jersey, and Pennsylvania. Had the comparison been made with the assailed column D, six-vehicle minimum rate, (applicable on cars weighing over 3,000 pounds), the latter rates for each of the compared movements except to Rockville and Silver Spring, Md., are higher than those in the Bannon tariff. On the basis of a seven-vehicle load the column D rates produce substantially more revenue than do the compared rates except to Rockville and Silver Spring where the compared rates produce 35 cents and $10.15 more revenue, respectively. Furthermore M & G does not show the weight of the vehicles which it transports under the Bannon tariff.

Protestant points out that the comparison by respondent Boutell of the assailed minimum seven-vehicle rate with the tariff series 36 no minimum rate, plus toll charge, is unfair not only because the latter rate does not require loading of a minimum number of vehicles but also because the latter rates include an origin terminal handling service. No such service is performed in connection with the movement of Volkswagens.

Protestant submits that respondents have not shown that the traffic conditions in connection with movements under the involved tariffs are in any way similar to the movements made under the compared tariffs. The compared tariffs are structured in a manner entirely different, in terms of truckload minimums, stop-in transit services, and split delivery movements, from the considered tariffs, and, therefore, no judgment may be made concerning the significance of the lower level of charges in the assailed publications.

Cost presentation

RESPONDENT

Respondent tariff bureau retained the services of a cost consultant to study motor carrier costs associated with the movement of imported automobiles under the assailed tariffs. The first step was the gathering of data. A total of 17 carriers participate in the tariffs and a poli taken by respondent identified nine carriers as handling the predominant portion of the traffic. The consultant circulated a form to the nine carriers designed to obtain information for 1973 as to the number of imported vehicles handled, volume of loaded and empty trailer miles operated, and representative destinations. The material furnished disclosed that the nine carriers, with the exception of Kenosha Auto Transport Co., handled significant volumes of traffic. The principal carriers at Baltimore, Md., were Automobile Transport, Inc. (ATI), F. J. Boutell Driveaway Co., Inc. (Boutell), Clark Transport Co., Inc. (Clark), and Nu-Car Carriers, Inc. (Nu-Car); at Port Newark-Elizabeth, N.J., they were Arco Auto Carriers, Inc. (Arco), M & G Convoy, Inc. (M & G), ATI, Boutell, and Nu-Car; at Boston, Mass., and Providence, R.I., the principal carrier was Nu-Car; at Toledo, Ohio they were Clark, Gate City Transport Co. (Gate City), and Square Deal Cartage Co. (Square Deal), while at Chicago they were Arco and Clark. As the result of information developed by the survey, the aforementioned eight carriers, were requested to provide detailed revenue and expense data relating to operations at the aforementioned terminals where they were the predominant carriers, investment in transportation property and equipment in 1973, and data pertaining to increases in operating costs incurred in the early part of 1974 compared with 1973.

All except Arco furnished the information requested. The latter does not maintain its records so as to be able to provide information relating to particular terminals and thus could not develop revenues and expenses separately for its Chicago and Port Newark operations. Accordingly data pertaining to this carrier was not included in the cost study.

The seven carriers which supplied data for the study provided breakdowns of operating expenses incurred and revenues realized at the study terminals during 1973. A breakdown of expenses was necessary to derive information which could be applied to the standard cost format to develop expenses separately between those related to distance and those not so related. Costs related to distance are included in the line-haul category. Those not so related are classed as terminal expenses and are shown separately for loading-unloading as distinguished from all other terminal expenses. The procedure followed in assigning or allocating expenses to the various categories followed the methods developed by the Cost Finding Section of the Commission.

The study carriers showed that there were important increases in wage, health, welfare, pension and fuel payments and other operating costs during 1973 and January and February 1974. The increases are taken into account in the adjustment made in the 1973 operating expenses. With the 5-percent rate increase which became effective December 11, 1973, carriers which rely on owner-operators incurred a corresponding increase in purchased transportation costs.

The total expenses reported by the study carriers after adjustment to reflect January 1974 wage levels and February 1974 fuel prices were separated into four categories of expense, that is terminal loading and unloading, terminal-other expense, line haul, and general overhead. To the extent possible expenses were assigned to these four categories. Expenses which could not be directly assigned were allocated on the basis of driver-hours, equipment utilization, or estimates provided by the carriers. The expenses of each carrier at each terminal were separately tabulated. Expenses assigned or apportioned to general overhead were allocated to the other three categories on the basis of total expenses charges to these categories. Revenues covered by accounts 3120—Freight Revenue-Local Cartage, account 3130—Intercity Transportation For Other Carriers, and account 3900—Other Operating Revenue, were deducted from operating expenses at each terminal except in one instance where account 3130 mistakenly included traffic handled by the reporting carrier.

Each of the carriers reported the investment in carrier-operating property and the reserve for depreciation at the beginning and end of 1973, and from this information the average depreciated investment in 1973 was computed. An allowance for working capital was based on 5 percent of operating expenses for the year. Interest on depreciated investment and working capital was based on a 6-percent interest rate.

The total operating expenses of all carriers were combined and the resulting figure was divided by appropriate service units to arrive at a single set of unit costs applicable to operations under the considered tariffs. Expenses assigned or allocated to loading and unloading of $2,958,840 were divided by 409,503 automobiles, the number of vehicles loaded or unloaded by drivers operating from the study terminals in 1973, to arrive at a unit cost of $7.22 per vehicle. Total operating expenses for terminal operations, other than loading and unloading, came to $2,147,781. This figure divided by 449,392 vehicles results in a unit cost of $4.78 per automobile. This divisor is somewhat larger because it relates to total automobiles moving through the terminals, which for some carriers, is different from the loading and unloading count because drivers from other terminals are sometimes used in transporting cars through the terminals. Expenses for such drivers are included in the total expenses at the other terminals. Thus the total terminal cost comes to $12 per vehicle made up of $7.22 for loading and unloading plus $4.78 for other terminal handling.

The total line-haul expenses of the 7 study carriers were $11,526,969. Division of the latter figure by 10,100,720 loaded trailer-miles results in a unit cost of $1.14120 per loaded trailer-mile. This procedure spreads the line-haul expense over loaded trailer-miles associated with the round trip movement of equipment from the various study terminals. Costs per automobile mile were computed to be 19.020 cents for a six carload and 16.303 cents for a seven carload.

The foregoing study, as briefly outlined, permitted the development of fully allocated costs from the principal origins to selected destinations and opened the way for comparison of costs with the assailed rates from and to the same points. The costs include 100 percent of the operating expenses, rents, taxes, and interest expense on depreciated investment including an allowance for working capital. No allowance was made for profit.

Costs are shown from Baltimore, Port Newark-Elizabeth, Providence, Boston, Toledo, and Chicago, to destinations which are representative of the points served by the study carriers in 1973 from the standpoint of traffic volume and geographic location. The costs for each of the considered movements are compared with the rates under investigation and rate to cost ratios were developed. The results of the study are shown in table A of respondent's cost statement dated April 1, 1974. The assailed column B rates are compared with the costs incurred for truckloads comprising seven cars, while the column A, C, and D rates are compared with the costs for truckloads comprising loads of six cars.

As shown in table A, the column A rates failed in most instances to cover costs, and on the average accounted for 94 percent of costs thus failing by 6 percent to cover full costs. The column B rates are shown to be remunerative in some instances but not in others. The ratio of rates to fully allocated costs ranges from 89 to 118 percent with an average of 100 percent, or exactly equal to full costs with no margin for profit. The column C rates with but a single exception exceeded the full cost level with an overall average ratio of rates to costs of 112 percent or an excess of 12 percent over costs. The column D rates exceeded costs in all instances and on the average the rate to cost ratio was 131 percent or 31 percent over full costs.

In operations conducted in 1973 by the seven study carriers from their 13 terminals, the average load per trailer ranged from 6.26 to 7.04 vehicles or an average of 6.73 units. Thus the average cost per automobile mile for all loads transported would fall somewhere between the seven carload cost of 16.303 cents per mile and the six carload cost of 19.020 cents a mile. The average is made up of predominantly six and seven carloads but there were a few less than six and eight carloads.

Protestant is said to customarily limit itself to loading seven cars on a trailer. Though seven small cars such as the Volkswagen can be loaded on a trailer, it is very often the case that one or more larger cars are mixed with the shipment with the result that one less car is loaded. Most shipments under the considered tariffs comprise a mixture of vehicles of two weight brackets or occasionally three weight brackets though vehicles in the under 2,500 pound category predominate. Except for shipments of cars in the under 2,500-pound group, there are very few full loads of the heavier weight cars. Almost all of the heavier cars move in mixed loads with the smaller cars. The column A and B rates, that is those on vehicles under 2,500 pounds, apply on the predominant portion of the protestant's traffic. Only a small percentage fall in the column C rates, or vehicles in the range of 2,500 to 3,000 pounds.

The aforestated costs were developed to reflect full loads of six and seven cars from origin through to destination. No adjustment was made to give effect to reductions in the average load resulting from split delivery because practically all Volkswagen movements are in full truckload quantities to a single destination. Though some small car movements, other than Volkswagens, entail split deliveries, in general this distribution characteristic is more typical of the heavier more expensive cars. Thus the ratio of the column D rates to costs overstates the earnings achieved on the heavier cars. In the opinion of respondent's cost consultant, the use of an average load factor for movements of the heavier cars, offset to some extent by credits for split delivery charges, results in higher costs and lower ratios of rates to costs for movements under the column D rates. As noted the rates in column D are substantially higher than those in the other columns. The vehicles which move under these rates are luxury or high performance machines with a value of up to five times that of the vehicles which move under the column A or B rates.

Respondent emphasizes that as the vast majority of Volkswagen automobiles move under the column A and B rates, and as these rates account for 94 percent and 100 percent, respectively, of costs, the proposed increase is clearly justifiable. In many studies made by the Commission's Cost Finding section a standard allowance for profit, or revenue need, was included in the costs on the basis of an operating ratio of 93 percent. An allowance for profit based on a 93-percent operating ratio would provide a profit margin of about 7.5 percent above costs, or stated differently the ratio of rates to costs would have to amount to 107.5 percent to achieve an operating ratio of 93 percent. Thus for the column A rates to achieve the level of earnings represented by a ratio of 107.5 percent, they would have to be increased by an average of 14.4 percent, whereas the column B rates would have to be increased by an average of 7.5 percent.

Cost presentation

PROTESTANT AND RESPONDENT'S REPLY

Protestant's cost expert after evaluating respondent's study and examining the underlying workpapers makes a two-pronged attack on the study. Respondent replied to the criticisms in a statement dated August 23, 1974. For convenience and a more ready understanding of the dispute protestant's objections and respondent's reply will be treated together.

Protestant's first major thrust is that no validity can be accorded the cost study because of certain lapses or failings. Neither the cost study nor the underlying workpapers provide a way for measuring or correcting for the failures and protestant submits the study must be rejected as invalid resulting in the failure of respondent to sustain its burden of justifying the lawfulness of the assailed increases.

Protestant objects first to the manner in which the study carriers were selected, pointing out that a total of 17 carriers participate in the tariffs, but data was only gathered from 7. This is not a statistically valid sample and there is no showing that the seven carriers studied are representative of the average carrier in the universe.

Respondent in reply submits that there was no selectivity in fixing the identity of the study carriers because every carrier handling a significant volume of imported vehicles under the considered tariffs, with one exception, was included in the cost study. Of the nine initially polled carriers, one, Kenosha, transported 14,164 vehicles during the first 11 months of 1973 from four terminals of which 9,566 units moved out of Chicago. In contrast, Clark handled 54,816 vehicles in 1973 from Chicago alone. To confine the study to workable limits, costs for the Chicago area were based on information developed by Clark and no further consideration was given to Kenosha. Respondent states that the lack of data from Arco has no material effect on the results of the cost study because the two origins which this carrier serves, Chicago and Port Newark, are represented by Clark at the former and M & G, ATI, Boutell, and Nu-Car at the latter.

In response to protestant's crticism respondent's cost expert directed the respondent tariff bureau to determine the extent of the participation in the movement of imported vehicles of the eight carriers not originally polled. Four of the eight indicated they handled no traffic, three others stated that small or insignificant volumes were moved, while one, P & M Auto transport, handled about 66,000 vehicles from Port Newark of which 39,000 were delivered locally with the balance moving in joint-line service. Data for operations at Newark was supplied by M & G, ATI, Boutell, and Nu-Car. Respondent does not believe the inclusion of data for P & M would reduce costs, but rather would have the opposite effect because of the steep expenses associated with delivery in the New York metropolitan area. Finally it is pointed out that protestant knows which carriers are handling the predominant portion of its traffic, but it has not produced any facts tending to cast doubt on the representativeness of the data submitted by the study carriers.

Protestant questions certain of the underlying data which the study carriers supplied to their cost expert. It notes that Nu-Car reported handling 27,015 vehicles from

Boston, Providence, and New Haven, whereas protestant's records indicate that a total of 30,617 Volkswagens were handled out of the aforementioned terminals. The same carrier reportedly handled 53,018 automobiles from Toledo, whereas Volkswagen itself shipped 52,566 from this same point, suggesting that all but 452 of the cars handled by Nu-Car were Volkswagens. The above data clearly suggests that Nu-Car failed to report all vehicles handled.

Respondent in reply contends that protestant used the wrong count for cars handled by Nu-Car at Boston, Providence, and New Haven. The correct figure as reflected in the cost study 39,839 units. Thus it is clear that Nu-Car handled substantially more than the 30,617 Volkswagens which moved through the three port area. In addition a carrier identified as C & M Trucking Company handled a large volume of imported vehicles through Boston destined to points in Massachusetts in 1973, but these vehicles did not move under the considered tariffs. However, the addition of these automobiles to the total moving through Boston would further widen the spread over the number of Volkswagens handled via the three ports.

Respondent emphasized that it does not claim that the number of imported vehicles reported by the study carriers represents all imported traffic moving through the terminals. The underlying workpapers, a copy of which was furnished protestant, disclosed that Arco handled during the first 11 months of 1973, 16,863 units through Port Newark and 12,356 through Chicago. Moreover Kenosha, which was excused from the study, transported 14,164 vehicles during the same period through its Chicago, St. Paul, and Toledo terminals. These cars were not included in the study. Square Deal and Gate City as well as Kenosha reported that the Volkswagen was the principal car which moved through the Toledo terminal. Thus it is not suprising that Volkswagen should comprise such a large percentage of the total movement through this point.

Respondent emphasizes that loading and unloading expenses were computed on a total of 409,503 vehicles, but that terminal expenses, other than loading and unloading, were based on 449,302 units. The difference is represented by vehicles moving through terminals at Port Newark, Boston, Providence, and New Haven and is the number of vehicles where drivers from other terminals are used in transporting cars moved through the study terminal. The total number of cars moved through the study terminals is, therefore, 449,392 rather than 409,503.

Protestant is critical of the method used by respondent in allocating expenses to the various service categories. It points out, for example, that some method is needed to apportion driver wages to "line-haul service," "terminal loading and unloading service," and "other terminal expenses." The Commission's cost formulas are said to require special studies in order that the aforementioned allocations may be made, but respondent conducted no such studies, relying instead on such subjective tests as "carrier judgement" of "consensus of carriers." Thus the portion of driver wages assigned to loading and unloading was 30 minutes per car. Hours of line-haul service was determined by dividing miles operated by 40 miles per hour. Equipment maintenance expense was evenly divided between the loading and unloading and the line-haul categories of expense. All of the aforementioned assignments were made on the basis of estimates or guesses supplied by the study carriers and protestant believes they have seriously distorted cost allocations. Reference is made to information developed by protestant's tariff consultant, who submitted a verified statement on other matters, which indicates that seven vehicles can be loaded within 45 to 60 minutes. This contrasts with respondent's allocation of 105 minutes to loading.

There is considerable doubt concerning the integrity of the study carriers terminal expense reports. There is no indication who prepared the reports and they are not verified. The terminal expense report of respondent Gate City is simply to the effect that 50.7 percent of system expenses are allocable to the terminal expense category, and is based simply on the fact that system costs bear the same relation to the terminal portion of system revenues.

In reply respondent states that there is no requirement that allocation factors be based on special studies. Protestant has introduced no evidence or showing that the allocation factors used which concededly were based on "carrier judgement" or "consensus of carriers" are incorrect. Concerning the element of loading time, the verified statement of the tariff consultant makes no reference to loading time. Undoubtedly the loading time information was relayed to the witness by unkown sources on his May 1974 visit to Dundalk Marine Terminal, but there is no solid evidence to this effect.

Respondent concedes that 15 minutes per vehicle was allocated for loading and the same for unloading. This factor was based on a "consensus of the carriers" which took into account, with respect to loading, such related work items as check in, paperwork, and contact time, and with respect to unloading such additional work items as contacting consignees, skid drops, and paperwork. A labor-management agreement applicable at Edison, N.J., the production site of the Ford Pinto, provides that the loading service consumes 15 minutes per vehicle. Thus for a trailer loaded with seven vehicles drivers receive loading time pay of one and three-quarters hours, or 15 minutes a vehicle which is exactly the time allocated by the study.

Concerning the criticism of the study carriers' terminal expense reports, respondent states that protestant, had it asked, would have been furnished the names of the officials which provided the reports. Gate City allocated 50.7 percent of system expenses to the Toledo terminal based on the revenue relationship of the company's Toledo and Detroit operations. There is no reason to believe that the expense distribution between the two terminals is not closely related to the revenue distribution.

Protestant questions the validity of the 34 different ratios used by respondent in restating the full year 1973 expense figures to the January-February 1974 level. None of the ratios was based on a reliable study. All are simply "carrier estimates." Protestant holds that the assailed 5-percent increase in rates does not justify respondent in showing similar increases in the categories of purchased transportation and equipment rents without drivers. A study of owner-operators actual costs is said to be required.

Respondent concedes that no study of owner-operator costs was made but its submits that carrier payments for purchased transportation in developing terminal and line-haul costs is proper. Furthermore, the decision in *Motor Carrier Rates—Owner-Operators*, 431 I.C.C. 28, permits the use of regional average costs as a test of the compensativeness of a given rate, and relying thereon respondent compares the costs developed by its study with the regional average cost per vehicle mile shown in I.C.C. statement No. 2C1-71. Because most of the considered traffic moves between New England and the Middle Atlantic Region and within the Middle Atlantic and Central regions, the variable cost per vehicle mile (loaded or empty) in these regions as shown in the aforementioned statement is multiplied by the study carriers' loaded and empty mile figure of 19,216,879 to give the total line-haul expense. Dividing the latter by the loaded mile figure of 10,100,720 miles gives the cost per loaded vehicle mile. Recognizing that motor carrier costs increased by 10 percent from July 1971 to July

1973, and by at least 5.5 percent as of February 1974 over mid-1973, respondent applies what it considers to be a conservative increase of 15 percent to the figures developed by the aforesaid formula to produce costs per vehicle mile as of February 1974. The following table shows the results of the computation on the fully allocated cost level:

TABLE

Region	Fully allocated cost per loaded vehicle-mile
	Cents
New England Group II	139.865
Middle Atlantic	125.787
Central	131.736

The variable cost per loaded vehicle mile are 90 percent of those shown. The above figures compare with the 114.120 cent figure developed by the cost study, and establish according to respondent that the latter is a conservative statement.

Protestant states that the fuel increase ratios are based on unverified data purporting to represent the cost of fuel at certain dates during the study year. No attempt was made to show the impact of the different prices per gallon, or the quantities contracted for or purchased at the different price levels.

In reply respondent explains that there was no reason to require the carriers to show the number of gallons purchased at each of the various 1973 price levels. Rather they were asked to furnish average costs effective at various times during 1973. From this information a weighted average cost based on the length of time each fuel expense figure was in effect was computed. This approach assumes that the consumption of fuel is uniformly distributed throughout the year. The adjustment of expenses to the January-February 1974 level had the effect of increasing the 1973 fuel expense by 34.9 percent. As illustrative of the reasonableness of the increase factor, reference is made to the U.S. Department of Labor's Wholesale Price Index, which, in a release of June 13, 1974, shows that fuel (and related products and power) increased by 55.8 percent during the 12-month period ending May 1974. Figures published by the Association of American Railroads show that fuel cost for eastern district railroads as of January 1974 was 42 percent higher than the average cost in 1973. A later study shows that as of April 1974 the increase was 91 percent over the average 1973 cost.

Protestant objects to the increase factors applied to the wages of drivers, nondrivers, and mechanics, and to the health, welfare, and pension accounts because they are based on unverified data purporting to represent wages per hour and welfare expenses per week at several different dates during the study year, with no effort made to weigh these data against aggregate amounts actually paid during the various periods of time. Objection is also made to the actual level of the increase ratios applied to two of the study carriers, Boutell and M & G.

Respondent concedes that no attempt was made to apply the number of hours, numbers of miles, or other service units to wage rates, but the average costs in the various categories for the base year are weighted by the period of time for which they were in effect. The criticism concerning application of the increase factor to the expenses for Boutell and M & G is not valid because both use brokers and the ratio of 1.0458 was applied to the involved expenses to give effect to the increase in broker expense resulting from the December 11, 1973 rate increase.

Protestant submits that the increase in the base salary on which social security taxes are withheld of from $10,800 to $13,200 or 22 percent does not justify application of a 22-percent increase on the social security payments because no showing was made as to what portion of drivers wages will actually incur the full impact of the increase.

Again respondent admits that no attempt was made to determine the percentage of drivers wages on which the full percentage increased applied, but it believes that the full amount of the increase applies on wages paid to the vast majority of drivers. In 1973, Square Deal had 118 drivers on its payroll with an average wage $15,899. Gate City paid 21 drivers an average of $13,562. The above are said to be representative of wages paid throughout the industry. Furthermore, it is possible that on employees who change their employment during the year, the total amount of taxes paid by the carrier on behalf of such people could reflect combined earnings or more than $13,200, with the result that social security tax payments could be made on earnings of more than $13,200 per year.

Finally protestant objects to the 5-percent adjustment factor applied to various wage and nonwage expense categories because there is no explanation of how the increase was determined. Respondent points out that the assailed increase factor was actually applied only to ATI's expenses at Baltimore and Port Newark and Nu-Car's expenses at Baltimore and Boston. With respect to ATI, the adjustment was applied to expenses in the terminal category, that is, supervisory wages, and billing and collecting salaries. For Nu-Car the ratio was applied to the aforementioned items of expense and in addition wages for mechanics and garage employees. Wages for the aforementioned groups did not remain static, but increased by ratios commensurate with the increase in driver rates. Furthermore, the adjustment of costs to the January-February 1974 level is conservatively constructed in that it does not take into account the fact that no adjustment was made in such expenses as liability insurance, parts, and outside repairs, cargo loss and damage, administrative and general expenses, and tractor and trailer depreciaton.

Protestant's second principal criticism is to the effect that respondent's study, with certain quantifiable adjustments to expense and revenue items, establishes that the assailed rates exceed a reasonable level. For this purpose it works with or from the figures supplied by the study carriers, including those discussed under the heading of the first criticism, though of course it does so without waiving its previously stated objections. In general protestant contends that the way the study treats or fails to treat certain expense and revenue elements causes the former to be overstated and the latter understated with the result that the ratios of rates to costs as shown in table A of the statement dated April 1, 1974, do not reflect the actual experience of the carriers. With some reservations protestant is able to quantify the study's shortcomings and restate, for the same movements as shown in respondent's table A, the ratio of rates to fully allocated costs. The restatement, which is on two different bases, is shown in table 10 of protestant's critique dated July 1, 1974.

Respondent is said to have erred in comparing the assailed rates with costs prevailing as of January-February 1974. The proper practice would be to compare the rates with the level of expenses experienced prior to the October 24, 1973 filing date of the assailed tariffs. The effect of respondent's practice is to overstate the unit costs, while at the same time understating revenues by not including the 4-percent fuel surcharge which became effective March 1974. The first adjustment was to consider expenses at the full year 1973 level as reported by the study carriers with assignment of expenses to service categories in the exact manner as done by respondent. For this purpose a loading and unloading expense figure of $2,824,890, other terminal expenses of $2,102,728, and line-haul expenses of $10,793,214, or a grand total of $15,720,832 were used. The line-haul expense figure along with several other subsequently discussed adjustments is used in table 8 (line 9) in computing the average loaded cost per mile and underlies the rate to cost ratios at the "Recalculated 1973 Cost Level" as set forth in table 10, columns 1, 2, and 3 for all movements studied by respondent, and in table 9 for the shortest, longest, and the average haul from each of the six points of origin. The rates used in this comparison are those which became effective December 11, 1973. Protestant also shows the study carriers 1973 full year expenses as increased to the January-February 1974 cost level to be loading and unloading $2,958,840. Other terminal $2,147,781, and line haul $11,526,969, or a total of $16,633,590. The line-haul figure is carried forward to table 11, where along with several subsequently discussed adjustments, it is used in computing the average loaded cost per mile (line 9) and underlies the rate-cost ratios at the "Recalculated 1973 Cost Level Adjusted to Reflect January-February 1974 Costs and the Fuel Surchage" as shown in columns 6, 7, and 8 of table 10 for all the movements studied by respondent, and in table 12 for the shortest, longest, and the average movement from each of the six points of origin. The rates used in this comparison are those which became effective December 11, 1973, increased 4 percent as a result of the fuel surcharge authorized by the Commission.

Respondent in reply submits there is no rule which requires that it use costs associated with 1973 operations. To do so gives effect to only a portion of the increases in wages, fuel, and other operating expenses experienced in 1973 and ignores the increases occurring in 1974. Comparison of the assailed rates with operating expenses for the year 1973 gives a distorted relationship of the cost-rate ratios. Such treatment reflects the average cost level as of mid-1973 and does not take into account the annual effect of increases experienced during the year. For most carriers the September 1, 1973 increase in driver wages amounted to about 5 percent. The increase was included in expenses only for the last 4 months of the year, and the effective level of the increase in relation to total expenses for the year amounted to 1/3 of 5 percent or 1.67 percent. Respondent insists that 1973 operating expenses must be adjusted to give annual effect to the various cost increases experienced during the year.

Respondent points out that its cost study developed data covering operations in 1973 because this is the most recent period for which annual data was available. The costs so developed however were adjusted to the January-February 1974 level, the latest period for which wage and price information was available. The assailed rates were in effect in February and thus there was a comparison of like with like. There is no basis in reason or logic for comparing rates as of December 11, 1973, with costs as of mid-1973. Respondent submits that its adjustment ratio was entirely reasonable and conservative. The 1973 operating expenses of the study carriers were, with full annual effect given to cost increases, $16,631,422. Adjustment of this figure to the January-February 1974 price level produces a figure of $17,544,191, or an increase of about 5.5 percent. This is said to be conservative in that it does not take into account certain increased operating expenses incurred up to February 1974 as was previously mentioned.

Concerning protestant's criticism of the failure to add the fuel surcharge to the assailed rates, respondent explains that the surcharge did not go into effect until March 15, 1974, whereas the cost study was largely completed prior to this date. It strenuously objects to the misapplication of the fuel surcharge by protestant in the restatement. Furthermore, the effect of the fuel surcharge is said to be a trade-off and does not result in a substantial improvement in the carriers' net revenues. This is because the revenue retained by the carriers on the major portion of the involved traffic did not increase. The Commission provided that the surcharge should go to the party responsible for payment of the fuel charge and carriers which employ owner-operators passed the surcharge on the owner-operator. For purposes of gauging the general effect of the surcharge respondent shows that the increase on an annual basis in the 1973 intercity freight revenue accounts of the study carriers comes to $614,451 of which $267,201 or 43 percent is retained by the carrier and $347,250 or 57 percent is passed on to the owner-operator. It submits that the actual additional evenue brought in by the surcharge is less than that shown because of the reduced volume of traffic handled in 1974.

Criticism is directed at protestant's cost restatement at the so-called 1974 cost level insofar as they treat the fuel surcharge as shown in tables 10 and 12. In these tables which supposedly show respondent's cost at the 1974 level, protestant simply applied the 4-percent surcharge to the rates without adjusting the purchased transportation costs above the February 1974 expense level.

Protestant submits that respondent's cost study made serious omissions in the manner in which data was derived and applied in calculating costs. Thus in computing line-haul costs respondent divided line-haul expenses by loaded trailer-miles, but not all the loaded trailer-miles were included in the divisor with the result that there is a significant overstatement of the loaded line-haul unit costs and an understatement of the table A rate—cost ratios. Specifically, respondent's loaded trailer-mile figure of 10,100,720 units is disputed on the ground that it comprises only the outbound loaded miles for all seven of the study carriers and assumes that all return trips are empty which is not the case as reflected in the underlying workpapers. The workpapers show that four carriers, namely M & G, Clark, Square Deal, and ATI have some loaded return movements and protestant contends that the loaded trailer-miles must be greater than those used by respondent in computing the line-haul unit cost. From the underlying workpapers it shows that the return empty miles amounted to only about 90 percent (table 3) of the outbound loaded miles. Therefore, it believes that some part of the return miles should properly be included in the total loaded trailer-miles used to compute the line-haul unit cost. Next it sought to determine what portion of the difference between loaded outbound miles and counted return empty miles are loaded return miles. The underlying workpapers provide data for ATI, Clark, and Square Deal at four origins from which this calculation can be made. Table 4 shows that 53 percent of the difference between the loaded outbound miles and the inbound empty miles are actually loaded miles. In table 5 protestant shows for all the study carriers that the total of the loaded outbound miles plus the loaded return miles comes to 10,624,656 units or miles. This represents an increase of about 5 percent over the 10.100.720 miles used by respondent in its study. Because of the quality of the data on which the computation is made, protestant believes its figure is conservative. In table 8 protestant divides the 10,624,656 loaded trailer-mile figure into its full year 1973 line-haul expense figure of $10,793,214 resulting in a cost per loaded trailer-mile of $1.01587. A similar calculation employing the 10,624,656 loaded trailer-miles divided into the study carriers full year 1973 line-haul expense figure increased to the January-February 1974 cost level of $11,526,969 results in a cost per loaded trailer-mile of $1.0849263 as shown in table 11.

Respondent contends that there is no basis for assuming that its study is predicated on the theory that "all return trip miles are empty." Although many trips involve a loaded movement in one direction and an empty movement in the reverse direction over the same route, there are a number of variations which produce more loaded than empty miles. For example on split delivery movements, the loaded mile figure because of the need to serve several destinations could entail loaded miles which exceed the empty miles operated from the most distant destination back to the terminal. Another example would be where domestic loads were transported for a portion or all of the return movement. Respondent's cost expert insists that with the exception of a minor discrepancy, the 10,100,720 loaded trailer-mile figure is accurate and that it includes all loaded trailer-miles and not just outbound loaded Volkswagen movements. That this is so is established by the fact that the labor agreement between the carriers and the Teamsters Union provides for payment of drivers on a loaded mile basis. The count of the loaded driver miles is compiled from the payroll records covering each trip operated by each driver. On each trip the number of loaded and empty miles are determined.

Respondent's workpapers show for the year 1973, 10,100,720 loaded miles and 9,116,159 empty miles, or a loaded to empty percentage of 111 percent. One carrier, Boutell, had initially reported 1,915,987 loaded miles from its Baltimore and Port Elizabeth terminals and a corresponding number of empty miles, but it also reported handling a large percentage of split loads. Because split deliveries generally result in more loaded than empty miles, respondent's cost expert requested the carrier to make a further examination of the trailer miles originally furnished in its traffic study. Further data supplied by Boutell shows 1,927,028 loaded trailer-miles and 1,606,248 empty trailer-miles. The loaded-mile figure was derived directly from the company's payroll report and represents actual payments to drivers. The revised figure of 1,927,028 loaded miles is 11,041 miles greater than was reported in the original study. The addition of 11,041 loaded miles to the total loaded mile figure of 10,100,720 reduces the line-haul cost by one-tenth of 1 percent. The data originally supplied by all other carriers account for all loaded miles whether because of split delivery mileage or loaded mileage in return movements. Accordingly respondent insists there is no basis for protestant's adjustment of loaded trailer miles from 10,100,720 to 10,624,656 or 5.2 percent as is done in tables 8 and 11.

Protestant's next quantifiable criticism relates to the way split delivery expenses are treated. Though respondent concedes that Volkswagen movements rarely involve split delivery service, expenses incurred in the performance of this service are included in the line-haul expenses reported by the study carrier, and are part of the final unit costs and rate-cost relationships. Thus split delivery costs are allocated to each automobile carried regardless of whether or not a particular movement incurred such an expense. Protestant argues that these costs should not be charged against protestant or other shippers of light loading traffic.

Protestant then endeavored to determine the difference in cost between handling split delivery traffic and traffic not requiring this service. From respondent's underlying workpapers it was determined that about 30 percent or 19,344 outbound loads required split delivery service. See table 7. In table 8 the line-haul miles attributable to split delivery is calculated to be 386,880 derived by multiplying the 19,344 loads by 20 miles, the latter being the distance the average split delivery shipment is believed to move beyond the first unloading stop. Next the line-haul cost related to split delivery is figured to be $393,018 (386,880 times the line-haul cost per loaded trailer mile of $1.0158647). Subtraction of the latter figure from the total line-haul expense figure of $10,793,214, produces a line-haul cost excluding split delivery, of $10,400,196. Dividing the latter by the round trip loaded mile figure of 10,624,656, produces a loaded cost per mile excluding split delivery of .9788736 cents at the "Recalculated 1973 Cost Level." A similar procedure is followed in table 11 in developing the line-haul cost attributable to split delivery at the "Recalculated January-February 1974 Cost Level." Here the 386,880 split delivery miles at the line-haul cost per loaded trailer-mile of $1.0849263 produces a line-haul cost attributable to split delivery of $419,736. Subtraction of the latter figure from the total line-haul expense figure of $11,526,969, produces a line-haul cost excluding split delivery of $11,107,233. Dividing the latter figure by the 10,624,656 loaded trailer-miles results in an average loaded cost per mile, excluding split delivery, of $1.0454205. The ratio of line-haul cost per mile excluding split delivery costs is not more than 96.4 percent of the line-haul cost per mile including split delivery in both tables 8 and 11.

Protestant's records show that 226,577 vehicles moved out of the six selected origins comprising 55.3 percent of the 409,503 vehicles reportedly handled by respondents from the same origins. As respondent indicates that Volkswagens do not require split delivery service it seems clear that the magnitude of the split delivery service necessitated by the transportation of other vehicles is many times that calculated in the aforesaid restatements.

Respondent concedes that no adjustment was made in costs to give effect to reductions in the average load resulting from split deliveries, but no adjustment of line-haul expense is required, contrary to the opinion of protestant's expert, as there are no incremental costs included in the total line-haul dollars of expense. It submits that adjustment of the average load factor is the compensating factor requiring in computing line-haul costs for split delivery movements.

It is true that expenses for split delivery service were included in determining the cost per vehicle mile but the mileage operated in split delivery service was also included. Thus the only way the inclusion of split delivery trips could increase the average cost per vehicle mile would be if the cost per vehicle mile on split delivery moves was much higher than that for miles operated with straight loads. However this is not the case. Labor agreements provide that the driver is paid at the standard mileage rate even if only one vehicle is left from the original load. Thus the unit cost for split delivery mileage is no different from the unit cost for straight loads of seven vehicles. This is true not only for driver wages but also for line-haul maintenance costs, road taxes, fuel, insurance, and other variable costs. The variable costs remain at the same level whether one vehicle or seven are being hauled. Thus the computations in protestant's table 8 which show that the average unit cost per loaded trailer-mile, after deducting split delivery expense, is .9788736 cents or about 96.4 percent of the incremental line-haul cost for traffic requiring split delivery services, are illogical because all of the expenses chargeable on a trailer-mile basis remain the same for both split loads and full trailer loads. The computations in this table as well as table 11 which seem to show otherwise are meaningless. For example, after deducting the purported split delivery expenses (line 8) the witness divided such reduced expense by the inflated total of loaded trailer miles which includes split delivery miles. Thus the numerator excludes split delivery expense, but the denominator includes all miles associated with split delivery movements. Respondent emphasizes that the reason no adjustment was made in the average load was because, as previously explained, in 1973 most Volkswagens moved in solid loads. However there is now reason to believe that with the reduction in sales volume the number of split loads has increased thus causing the cost of transporting the vehicles to increase because of the reduction in the load factor.

Protestant's restated rate-cost ratios are shown for two different bases. One entitled "Recalculated 1973 Cost Level" compares the assailed rates with the study carriers full year 1973 average loaded cost per mile, with adjustments for loaded round trip miles and line-haul cost attributable to split delivery, of .9788736 (or .1398391 cents an automobile mile assuming a load of seven vehicles), cents plus a terminal cost of $11.58 per vehicle. The line-haul costs are calculated on a truckload comprising seven vehicles. In table 9 the rate-cost relationships are shown for the shortest, the average, and the longest hauls from each of the six origin points studied by respondent in table A. The assailed rates range from 5 to 23 percent in excess of fully allocated costs and the average is 13.2 percent. Table 10, columns 1, 2, and 3 shows the same information for all the movements studied by respondent. On the average the assailed rates are 13 percent in excess of costs indicative of an operating ratio of 88.5 percent.

Protestant's second restatement titled "Recalculated 1973 Cost Level Adjusted to Reflect January-February 1974 Costs and Fuel Surcharge" compares the assailed rates, increased 4 percent as the result of the fuel surcharge, with the study carriers full year 1973 average line-haul cost per mile, adjusted to reflect the January-February 1974 cost level and with the aforementioned round trip loaded miles and costs attributable to split delivery adjustments, of $1.0454205 (or .149346 cents an automobile mile assuming a load of seven vehicles) plus a terminal cost of $12 a vehicle. In table 12 protestant shows the rate-cost ratios for the shortest, the average, and the longest haul, from the six origin terminals studied by respondent. The rate-cost ratios show that the profit margins range from 4 to 24 percent over fully allocated costs with an average of almost 11 percent. Table 10, columns 6, 7, and 8 show the same information for all the movements studied in respondent's table A. On the average the assailed rates exceed fully allocated costs by about 10 percent which is equivalent to an operating ratio of 90 percent.

Finally protestant argues that the assailed rates produce profit margins far in excess of those realized by any of the participating seven study carriers. The 1973 operating ratios of these carriers as shown in table 14 ranged from 92.7 to 101.4 and averaged 98.3. Protestant does not wish to imply that a ratio of 98.3 is satisfactory, but rates, which based on a 1973 cost level adjusted as hereinbefore stated, which gave a profit margin of 13 percent are prohibitively high and unreasonable. Furthermore had the various cost factors used by respondent been fully quantifiable, the rate-cost ratios would have been substantially higher producing ratios of between 85 and 88.5 for the restated 1973 cost basis.

In reply respondent submits that protestant's rate-cost ratios are incorrect, pointing out that the study carriers had 1973 operating expenses of $16,631,422 (with cost increase annualized) and operating revenues of $16,949,686 producing an operating ratio of 98.1 percent. The same categories adjusted to expenses and revenues at the January-February 1974 level are $17,544,191 and $17,673,510, producing an operating ratio of 99.3 percent. The study carriers net operating income in 1973 was $318,264 or less than 2 percent of operating revenue. The increase in rates effective December 11, 1973, did not offset the cost increases encountered in late 1973 and early 1974. It seems clear that the system operating ratio of the study carriers of 98.3 is entirely consistent with the 98.1 ratio established by the cost study.

Furthermore it is apparent that an operating ratio of 98.1 cannot be squared with the 13-percent profit margin developed by protestant's restatement at the 1973 cost level. The restatement covered only movements of seven carloads moving under the column B rates. Nothing was said concerning the column A, C, or D rates. Respondent refers to the fact that its study shows that the column A rates failed to cover costs in almost every one of the movements studied. The margin of revenues over expenses were substantially higher on the columns C and D rates because of the higher charges applicable on the more expensive cars. The irrational character of protestant's restatement is apparent when one attempts to square the purported 13-percent profit margin of the column B rates plus the even greater profit margins of the columns C and D rates with the 1973 operating ratio of 98.1 or a profit margin of less than 2 percent on total imported automobile traffic.

DISCUSSION AND CONCLUSIONS

Before discussing the substantive issues certain procedural matters must be considered. Respondent moves to strike those portions of the verified statements of protestant's witnesses and the argument of its counsel which relate to the lawfulness and/or the applicability of the "Toll and Marshalling Charge," "Origin Terminal Handling Charge," and "Toll Charges" on the ground that the assailed provisions were published in earlier tariffs and are no longer in effect. Resolution of the lawfulness of these provisions is said not to be relevant to the issue in this proceeding which relate merely to the lawfulness of the 5-percent increase in rates. Furthermore the "Toll and Marshalling Charge" and the "Origin Terminal Handling Charge" were the subject of the decision in *Volkswagen South Atlantic Distributor, Inc.* v. *F. J. Boutell Driveway Co., Inc., Et Al.*, docket No. 35807, decided April 22, 1974, by Review Board No. 4, which held that the assailed charges were properly applied on vehicles accorded the services which the charges covered, but on no others. The evidence of record did not provide a factual basis for determining the number of vehicles accorded the special services or those which were not, and the report held that resolution of this issue must be based on information known only to the parties. The proceeding was discontinued and petitions for reconsideration were denied July 3, 1974. The cited proceeding was ancillary to a complaint before the United States District Court for the District of Columbia which tribunal has original jurisdiction to determine the extent of complainant's damages. The fixing of damages, if any, is now pending in the United States District Court for the District of Columbia in civil action No. 1897-72. Complainant in the above cited proceeding is a wholly owned subsidiary of Volkswagen of America, Inc., the protestant in this proceeding, and the latter's protest was filed on behalf of its subsidiaries. Respondent submits that as the lawfulness and applicability of the aforementioned charges in effect prior to May and June 1971, were considered by the Commission in docket No. 35807 they may not be collaterally attacked here.

Respondent stresses that the lawfulness of the "Toll Charges" may not be considered in this proceeding because this issue is pending in the case of *Volkswagen of America, Inc., Et Al* v. *Arco Auto Carriers, Inc., Et Al*, civil action No. 4-71240 in the United States District Court for the Eastern District of Michigan, Southern Division. The plaintiff in that proceeding indicated that it would file a related complaint with the Commission. Thus the lawfulness of the "Toll Charges" will be determined by the complaint proceeding to be filed with the Commission, after which the court will determine the amount, if any, of damage. It would be improper respondent submits for the Commission to detemine in this proceeding issues relating to matters pending in another proceeding.

The clear import of the Commission's order of December 7, 1973, instituting this investigation, was to bring in issue the assailed schedules in their entirety including all the constituent elements or factors which comprise the rates. Thus the order is sufficiently broad to encompass the propriety of incorporating the "Toll Charges" into the line-haul rates as well as the lawfulness of the 5-percent increase and the level of the Mackinac Bridge charge.

Protestant offers several arguments as to why the incorporation of the "Toll Charge" into the line-haul rates is unlawful, but the one pressed most vigorously is that this charge and its predecessors, the "Origin Terminal Handling Charge" and the "Toll and Marshalling Charge" were levied on each vehicle transported regardless of whether the shipment received the services or moved over routes where toll expenses were incurred. Protestant has established beyond reasonable doubt that the three aforestated charges represent a continuing and successive effort on the part of respondent to collect a charge for certain services regardless of whether or not actually performed. Two of protestant's witnesses testified that its shipments had not been extended any services of the type which would warrant application of the "Toll and Marshalling Charge" or the "Origin Terminal Handling Charge" and that the vast majority of the vehicles were transported over routes which did not entail payment of "Toll Charges." In the ***Volkswagen South Atlantic*** case, ***supra***, an affiliate of the protestant in this proceeding assailed the "Toll and Marshalling Charge" and the "Origin Terminal Handling Charge" on the twin grounds that they were inapplicable and unjust and unreasonable. The report concluded that the charges were applicable only on the vehicles accorded the special services covered by the rules. The record provided no way to determine the number or identity of shipments accorded the special services or those which were not and the report concluded that this was a matter to be determined by the parties from such information as they might have. The matter of measuring complainants' damages is now pending in Federal District Court for the District of Columbia. The issue of the applicability and reasonableness of the "Toll Charges" was not involved in the aforesaid proceeding but a lawsuit has been filed in the Federal District Court in Michigan and it is likely that an ancillary complaint will be filed with the Commission. Though it would be premature to speculate on the contentions which might be involved in such a complaint and any discussion would not be dispositive of the issues raised in the complaint, but reliance on the principle of ***stare decisis*** would appear to indicate that the Commission will find that the "Toll Charges" are applicable only as to those shipments which incur a toll expense.

Be this as it may however, the report in the ***Volkswagen South Atlantic*** case stands for the principle that the assailed charges are only applicable on shipments accorded the special services extended by the rules. The effect of respondent's action in incorporating the "Toll Charges" into the line-haul rates, which on this record is found to be the successor to the earlier provisions, is to extend the charge to all shipments and not just those which receive the special services. Thus it is apparent that the incorporation of the charges into the line-haul rates raises an issue of lawfulness which is not ***res judicata*** and respondent's motion to strike is denied.

Though the lawfulness of the incorporation of the "Toll Charges" is clearly a legitimate issue to be resolved on its merits, protestant presents no convincing evidence or argument that the assailed practice is violative of the provisions of the Interstate Commerce Act. This is so for several reasons. First, the principal issue in this proceeding is whether the assailed schedules comport with the just and reasonable provisions of section 216 of the act. In the resolution of this issue the question of the propriety of incorporating what was formerly an accessorial charges into the line-haul rates is beside the point. The issue here is whether the assailed rates as an entity are on a just and reasonable level, and not whether this or that factor should be incorporated into the line-haul rate.

It is true in a sense that respondent's action in canceling the "Toll Charge" defeats the lawsuit filed by protestant in the Federal District Court for the Eastern District of Michigan, Southern Division, but this is so only for shipments moving on and after December 11, 1973. Also the evidence of record is consistent with the conclusion that respondent's action was not taken in the interest of tariff simplification, but was designed to defeat for the future the benefit which might accrue to protestant if it were successful in prosecuting its complaint concerning the illegal exaction of the "Toll Charges." But again motive, intent, or purpose are not really pertinent. Except with respect to matters such as rebates or concessions, carriers are free to modify the terms under which their services are held out including the right to cancel a controversial charge and then turn around and increase the line-haul rates by the amount of the canceled tariff provision. In the past the Commission has discouraged the practice of incorporating accessorial charges into the line-haul rates because application of future general revenue increases might result in higher charges than would be the case if the accessorial charge had remained as a separate identifiable item. However, there is no proscription in the act relating to this practice, and in the final analysis it must be judged on the conformity of the line-haul rates to the just and reasonable standards of section 216. Treatment of this issue can be more appropriately handled in the discussion relating the cost evidence.

Protestant also argues that the increase in the "Toll Charges" over the years is many times greater than the increase in the highway, bridge, and tunnel tolls over the same period, but this argument though perhaps pertinent to the lawfulness of a separately published toll charge, loses its force when the charge is absorbed into the line-haul rate. When this occurs the issue turns on the lawfulness of the line-haul rate as an entity. Protestant, however, is on sound ground in attacking the Mackinac Bridge crossing charges. Such a charge should be on approximately the same level as the cost incurred in the crossing. Clearly there is no justification for tariff No. 164-H imposing an $11 charge and tariff No. 165-I levying a $13 charge. Also there is no warrant for applying a round trip toll charge when the vehicle may return via a nontoll route. The record indicates that the maximum crossing charge is $5.50 for a five axle tractor-trailer combination and it is concluded that the assailed charges are unjust and unreasonable to the extent they exceed this figure.

Protestant's argument that the publication of the assailed accessorial charges or the efforts to eliminate the charges failed to conform to the rules in Tariff Circular MF No. 3 have been discussed in the main body of the report under the section headed "Protestant's Evidence" and there is no point in repeating the presentation.

Respondent seeks to justify the assailed schedules on the basis of both rate comparisons and a cost study. The compared rates apply on the movement of both domestic and imported vehicles between points in the same general area as where the assailed tariffs have application. They are on a higher level and produce greater revenue than do the assailed rates and respondent submits that if the latter were brought up to the level of the compared rates they would be subject to increases ranging from 14 to 25 percent. Protestant counters with the argument that the circumstances surrounding the compared movements and the tariff limitations are much looser than those which govern the movement of protestant's vehicles under the assailed tariffs.

Protestant seeks to strike portions of the initial verified statement submitted by the respondent tariff bureau on the ground that they are irrelevant and immaterial, or if relevant and material are conclusiary without benefit of any underlying factual predicate. Thus, the testimony that the respondent carriers have experienced increased costs of conducting business, that the assailed import rates have not kept abreast with the increases applied on domestic shipments, and that protestant allegedly has enjoyed bargain transportation to such an extent that additional increases ranging from 14 to 25 percent are justified, is merely conclusiary without benefit of an underlying factual predicate on which to test the validity of the assertions.

Respondent's discussion of the incorporation of the "Toll Charges" into the line-haul rates is said to be irrelevant because there is no evidence that traffic moving under the provisions of these tariffs incur toll expenses. The attempt to justify incorporation of the charges into the line-haul rates on the ground that a similar course of action was taken several years ago on domestic movements is not an accurate statement of the treatment accorded domestic traffic.

Protestant requests that the rate comparisons made by respondent be stricken on the ground of relevancy in that there are a number of features attaching to the compared rates and to the traffic which moves pursuant to these tariffs which distinguish them from the assailed tariffs and the Volkswagen traffic which moves under these tariffs. The principal distinguishing feature is that the compared tariffs are generally applicable on shipments with no minimum number of vehicles required to be loaded on a truck, or if there is a minimum restriction, it is less than the seven vehicle minimum under which most Volkswagens move. Furthermore, the compared tariffs have no charge for drop-off delivery, and at least one of the publications has a storage-in-transit arrangement. The compared domestic tariffs including Nu-Car tariff No. 40-S, and respondent's tariff Nos. 176-C and 116-U apply on domestic vehicles and there is no convincing evidence showing the size of the vehicles transported under the compared tariffs or that the characteristics of the movements are comparable to the movement of Volkswagens. Protestant points out that if the six vehicle minimum rates in Bannon tariff No. 4 were compared with the assailed six vehicle minimum rates, column D, the latter would show rates and revenues substantially higher than those shown in the Bannon tariff.

The motion to strike will be denied. The statements regarding increased cost of conducting business, the alleged lower level of import rates as compared with domestic rates, the bargain transportation enjoyed by protestant, and that incorporation of the "Toll Charges" into the line-haul rates was accomplished several years ago on domestic movements, were all testified to under oath by a competent witness. Protestant shows that respondent erred in equating the considered incorporation of the "Toll Charges" into the line-haul rates with the earlier practice on domestic movements, but disputes between parties as to the real state of the facts will not ordinarily support a motion to strike. It is true that the statement regarding the bargain transportation enjoyed by protestant is argumentative, but it is based on respondent's interpretation of the evidence offered in support of its position. The rate comparisons offered by respondent are generally relevant to the issues presented for disposition. Like the assailed rates they apply on automobiles including vehicles of the size of the Volkswagen and though, as hereinafter discussed, differences do attach to movements of traffic under the compared and assailed tariffs, these are matters which must be evaluated in light of all the evidence of record in order to reach a reasoned conclusion.

Protestants also filed motions to strike portions of the reply verified statements submitted by the respondent tariff bureau and its cost consultant, and in their entirety the three statements filed by Nu-Car, Boutell and M & G. The latter are carriers which participate in the assailed tariffs. The motion relating to the cost study will be treated in a subsequent section of the report. In substance protestant contends that the reply verified statements are not confined to the rebuttal of evidence offered by it, but that new material which it has no opportunity to rebut is advanced. Relying on rule 49 of the Commission's General Rules of Practice and the decision in ***Leonard Bros. Transf. & Stor. Co., Ext.—Oil Field Equip.***, 48 M.C.C. 773, protestant argues that fundamental fairness demands that respondent not be permitted to raise new issues in rebuttal. It submits with respect to the reply statement of the tariff bureau, that respondent's position to the effect that the propriety of incorporating the "Toll Charges" into the line-haul rate is immaterial to the real issue in this proceeding, and the disclosure of data relating to average loading and other circumstances surrounding the movement of traffic under the compared tariffs, is entirely new matter and ought not be permitted.

The motions relating to the reply statements filed by the three participating carriers explains that the latter filed no initial verified statements. Furthermore Nu-Car's reply statement contains a rate and revenue study presented for the first time, the Boutell statement gives additional data relating to the movement of import traffic out of Baltimore pursuant to tariff No. 36 as compared with movements under assailed tariff No. 164-H, while the M & G statement refers for the first time to the volume of traffic handled out of Newark, Del., the average load of imported Chrysler vehicles moving under Bannon tariff No. 4, and a study comparing eastbound movements under Bannon tariff No. 2-L with westbound movements under assailed tariff No. 164-H covering a period of time which was subsequent to the date respondent's initial statement was prepared.

There is no merit in the motions. Respondent tariff bureau in its initial statement prepared March 25, 1974, presented a twofold argument. First it explained that the incorporation of the "Toll Charges" into the line-haul rates was not a real issue because it did not result in a change in the total charge borne by the shipping public. Second, it offered certain rate comparisons which, it argued, tended to show that the assailed rates were on a less than reasonable level.

Protestant countered with facts and argument to the effect that incorporation of the "Toll Charges" was not lawful and that the compared tariffs and the traffic which they handled differed from the assailed tariffs and the Volkswagen traffic which moved thereunder. The rebuttal offered by respondent merely developed and expanded upon the very same issues. It is true that the three-named carriers did not file initial statements, but the initial statement filed by respondent tariff bureau named and discussed the three carriers. The subject matters covered in the reply statements of Nu-Car and Boutell were mentioned in the respondent tariff bureau's initial statement dated March 25, 1974, and all that the carriers did was to describe in more detail the circumstances surrounding the movement of traffic under the compared rates. M & G did refer in its reply statement for the first time to tariff No. 2-L but it is not believed that this constitutes undue broadening of the issues inasmuch as the new showing merely relates to a comparison of rates and revenue under tariff No. 2-L with those under assailed tariff No. 164-H.

Considering in a substantive way the rate and revenue comparisons offered by respondent, it is clear that no weight can be given some of the compared rates and movements. Thus tariff No. 176 from Norristown, Pa., and Madison, Ill., and tariff No.

116-U from Kenosha, Wis., apply on the movement of domestic automobiles and there is nothing to show the range in the number of automobiles which are loaded on a truck for movement under these tariffs. Average loading is an important element in, measuring the compensatory character of a rate and in the absence of such information no real weight may be accorded the comparison.

As pointed out by protestant the compared rates with but a few exceptions do not require that the shipper tender a minimum number of vehicles in order to comprise a shipment, whereas the assailed tariffs require that the shipper tender a minimum of six or seven vehicles at one time in order to comprise a truckload. Respondent refers to several compared movements where the actual loadings are comparable to the assailed column B, seven vehicle rates. This is true of the movements of Pinto vehicles from Edison, N.J., under Nu-Car tariff No. 40, imported Chrysler vehicles originated at Baltimore under Bannon tariff No. 4, and domestic Chrysler movements from Detroit under Bannon tariff No. 2-L. The Nu-Car tariff No. 40 rate for the 158 mile trip from Edison to Baltimore produces, on the basis of a seven vehicle load, $368 per truckload and $2.33 per mile whereas the assailed rate for a trip of about the same distance from Baltimore to Sommerville, N.J., generates $264 per truckload and $1.68 per mile. The rates on imported Chrysler vehicles, of about the same weight as Volkswagens, under the Bannon tariff No. 4 are about $9 per vehicle more than the assailed rates. Even when the assailed rates are credited with drop-off charges comparable to the average number of drop-offs made under the compared tariff, they retain a substantial advantage for the shipper. The same type showing is seen when comparison is made between eastbound movements from Detroit under Bannon tariff No. 2-L with westbound movements from Baltimore under assailed tariff No. 164-H. Thus, in the important categories of average load and crediting the assailed rates with the normal pattern of drop-offs experienced in the compared movements, it is apparent that the shipper's ability to use the assailed tariffs affords it an advantage not available to those which ship under the compared tariffs. As protestant points out there are other ways in which the compared tariffs offer services which are not available under the assailed tariffs, but these matters are believed to have little or no significance in determining the worth of the rate and revenue comparisons.

Protestant moves to strike portions of the reply statement filed by respondent's cost consultant on the general grounds that new material of which protestant was not previously aware of and which it cannot rebut were offered for the first time. The motion covers 10 different subjects and embraces the full range of respondent's rebuttal. Respondent's original cost statement discussed the full sweep of the study in somewhat broad and general terms. Protestant after examining the study and the underlying workpapers made a twofold attack, one being chiefly critical while the other was a restatement of the rate-cost ratios. Respondent countered by exploring in more detail the basis for its study, and in this connection data not previously mentioned was presented. The new material related principally to expenses associated with purchased transportation and driver wages, the effect of the fuel surcharge, the development of fully allocated cost per loaded vehicle mile based on regional average figures, and development of the total loaded trailer-miles operated by the study carriers. All these subjects related to matters raised by protestant either in criticism or in its restatement of the study. The motion is denied.

The assailed tariffs contain four groupings or columns of rates and the 5-percent increase was applied across the board. The columns A and B rates apply on vehicles weighing under 2,500 pounds while the columns C and D rates cover heavier automobiles. Only one protestant opposes the increase and its vehicles take either the column A six vehicle minimum rates or the column B seven vehicle minimum rates. Most shipments are made pursuant to the column B rates and the major focus of the proceeding is directed to the just and reasonable character of these rates. Respondent developed a study whose purpose was to determine the fully allocated cost of handling traffic shipped under the assailed schedules. The study shows that the assailed column A six vehicle minimum rates account on the average for 94 percent of costs while the column B rates on the average are 100 percent of full costs. The columns C and D rates are well in excess of full costs.

Evaluation of the study on the basis of respondent's initial showing, protestant's criticisms, and respondents reply, establishes that the assailed rates are on a just and reasonable level. The study measured rate-cost relationships from operating data supplied by seven of the 17 carriers which participate in the tariffs. The seven study carriers handle the predominant portion of traffic moving under the assailed tariffs and collectively they move a substantial volume of vehicles from the six principal origins where the traffic originates. Though no operating data was received from 10 carriers, the record discloses that seven of the 10 handled little or no traffic. The three remaining carriers, Kenosha, Arco, and P & M handled a significant volume of business, but the origins they served were well represented in terms of vehicles handled by one or more of the study carriers.

Protestant is critical of respondent's failure to develop a statistically sound sampling technique to be certain that the data collected from the study carriers is representative of the average carrier in the universe. Though respondent did not construct a random statistical sampling study, the evidence shows that the major carriers participated in the study and the impact of their operating expenses gives a fair and representative account of actual expenses experienced in handling traffic under the assailed tariffs. Protestant is a substantial shipper of traffic but has supplied no information which impugns the representativeness of the data supplied by the study carriers.

Protestant is critical of respondent's updating the 1973 operating expenses to the January-February 1974 cost level, contending that the assailed rates should be compared with the cost level prevailing as of the October 1973 filing date of the assailed schedules. There is no merit in this position as it ignores expense increases occurring in late 1973 and early 1974. The reasonableness of a rate should be determined in relation to the cost of providing service for a period as close as possible to the submittal date of the proceeding to the Commission for disposition. Particularly under present day economic conditions respondent did not err in comparing rates established in December 1973 with costs as of early 1974.

Respondent is faulted in its allocation of expenses to the various service categories and to the ratios used in updating 1973 expenses to the January-February 1974 cost level because no studies were made as a predicate for selection of the allocation factors or the update ratios. Respondent it is said relied on estimates, judgments, or crude calculations and thus it has not sustained its burden of proof. Furthermore, the record does not disclose the identity of the persons submitting input data on behalf of the study carriers, and there is no verification of the data which is furnished.

Respondent's cost study is verified, but of course there was no verification of the underlying data on which the study was based. The proper time to assail the validity or accuracy of the input data is prior to submittal of the proceeding to the Commission for disposition. Protestant made no request for cross-examination, and in the absence of evidence to the contrary respondent's allocation factors and update ratios will be accepted. The burden of sustaining the just and reasonable character of the increase is on respondent, but carrier judgments are entitled to acceptance at face value if they square with standards of reasonable practice.

In its criticism of the allocation factors protestant relied for the most part on the argument that respondent had failed to meet its burden of proof. Only on two items did it assail specific allocation factors. The first related to driver wages allocable to the loading and unloading operation. Respondent allocated 15 minutes per vehicle for the loading operation and protestant believes that this is excessive and that something in the range of 7 to 9 minutes is more accurate. Respondent based its figure on a labor-management agreement at Edison, N.J., which provides for 15 minutes per vehicle, whereas protestant does not disclose in detail the basis used to reach its figure. Though it is clear that the Edison agreement does not by its terms cover imported automobiles, there are no real grounds for disputing respondent's allocation of time. Protestant's second specific criticism is to the terminal expense report of Gate City, one of the study carriers, which allocated 50.7 percent of system expenses to the Toledo terminal. The allocation was made on the basis of the revenue relationship of the company's Toledo and Detroit operations. Protestant furnishes no support for its suspicions concerning the accuracy of the computation and it is deemed to be accurate.

In arriving at the update ratios respondent prorated the increased operating costs over the various categories of expense. The cost of purchased transportation was increased 5 percent because of the 5-percent increase in rates. Protestant criticizes this practice because it does tie the cost increases to actual payouts. Respondent could have made a study of the type suggested but this would involve substantially greater expenditure of time and without reasonable expectation that the result would be significantly different. The development of the cost of purchased transportation was clearly proper under all the circumstances of record. The aforementioned discussion must be considered in relation to the fact that respondent's cost adjustment did not take into account increases attributable to such expense items as liability insurance, truck parts, loss and damage claims, and outside repairs, and in this context it is conservatively constructed. That this is so is illustrated by comparison of the unit cost per loaded trailer-mile of 114.120 cents developed by respondent's study as against the regional average figure of 125.787 for Middle Atlantic, 131.736 for Central, and 139.865 for New England Group II.

Protestant lays great stress on the fact that respondent's loaded trailer-mile figure of 10,100,720 miles is understated causing the loaded line-haul unit costs to be overstated. It constructs what it believes to be a more accurate figure of 10,624,656 miles, but as explained in respondent's reply verified statement the original figure is substantially accurate and it includes all loaded miles operated by the study carriers and thus there is no basis for protestant's adjustment. Protestant used the inflated 10,624,656 figure in its restatement as a divisor in computing average loaded cost per mile, and this caused a significant understatement in the expense figure.

Another significant adjustment made by protestant was to deduct from total line-haul expenses an amount attributable to split delivery. However, line-haul costs are not significantly affected by whether the trailer is carrying a full or less than a full load of vehicles. Such important expenses as driver wages, truck maintenance, depreciation, and fringe benefits remain the same regardless of the weight or units loaded on the truck.

Protestant in its restatement titled "Recalculated 1973 Cost Level Adjusted to Reflect January-February 1974 Costs and Fuel Surcharge" made the aformentioned adjustments in the study carriers' average loaded cost per mile and then struck rate-cost relationships by adding the 4-percent fuel surcharge to the assailed rates but without making a corresponding adjustment in the expense item of purchased transportation. Obviously, such a one-sided adjustment is entitled to no weight.

The overall 1973 operating ratio of the study carriers was 98.3 percent, yet protestant would have it believed that the assailed rates produce, in relation to the full year 1973 expenses, revenue 13 percent in excess of full costs. The 13-percent profit margin pertains to the movement of seven vehicles to a truck and it would follow that the higher columns C and D rates would generate similar or even greater profit margins. But such inflated profit margins on the bulk of the traffic handled pursuant to the assailed tariffs cannot be squared with either the 98.3 percent operating ratio of the study carriers in 1973, nor the 98.1 ratio realized on the involved traffic.

The evidence establishes that the rate cost ratios developed in table A of the statement dated April 1, 1974, are an accurate portrayal of the respondent carriers actual experience. Considering that the columns A and B rates comprise on the average 94 and 100 percent of costs with no allowance for profit and that respondent carriers operating costs are understated, it is concluded that any rate distortion created by incorporating the "Toll Charges" into the line-haul rate is *de minimis*. In consideration of the showing made by the aforementioned rate comparisons and the rate-cost relationships referred to above, it is concluded that the assailed schedules, except with respect to Mackinac Bridge crossing charge, are just and reasonable.

FINDINGS

Upon consideration of all the evidence of record it is found that the assailed schedules are not shown to be just and reasonable without prejudice to the republication of such schedules containing Mackinac Bridge crossing charges no greater than $5.50 per tractor-trailer combination. An order will be entered requiring cancellation of the proposed schedules and discontinuing the investigation. It is further found that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That respondent be, and it is hereby notified and required to cancel the schedules described in the order of December 7, 1973, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, without prejudice to the filing of new schedules in conformity with the above-stated conclusions and findings.

And it is further ordered, That the proceeding be, and it is hereby discontinued.

By the Commission.

No. 32448 (Sub-No. 1)

UNIFORM SYSTEM OF ACCOUNTS FOR RATE BUREAUS

Decided December 1, 1977

Upon investigation and consideration of views, arguments, and representations of parties, a Uniform System of Accounts for Rate Bureaus (USOA), (49 CFR 1211), is adopted to be effective January 1, 1978.

Harry J. Breithaupt, Jr., and *James L. Collier, Jr.*, for Association of American Railroads.

John Womack for Central and Southern Motor Freight Tariff Association, Incorporated.

Joseph P. Wolonsky and *Charles F. Schumacher* for Central States Motor Freight Bureau, Inc.

Francis L. Wyche for Household Goods Carriers' Bureau.

J. Alan Royal for Middle Atlantic Conference.

F. H. Lynch, Jr., for Middlewest Motor Freight Bureau.

Carroll F. Genovese for Movers' and Warehousemen's Association of America, Inc.

William W. Pugh for National Classification Committee.

Z. L. Pearson, Jr., *William E. Kenworthy*, and *Gerald W. Hess* for Rocky Mountain Motor Tariff Bureau, Inc.

John W. Joyce and *Sherman D. Schwartzberg* for Southern Motor Carriers Rate Conference.

John J. Dolan for Southern Ports Foreign Freight Committee.

John F. Donelan and *Frederic L. Wood* for the National Industrial Traffic League.

Robert H. Lindsay for Western Railroad Traffic Association.

REPORT OF THE COMMISSION

By the Commission:

By Notice of Proposed Rulemaking (NPR) dated September 21, 1976, served October 14, 1976, and published in the Federal Register on October 19, 1976 (41 F.R. 46103), we announced that we had under consideration the adoption of a Uniform System of

Accounts (USOA), that would provide uniformity in the manner in which financial data is maintained by rate bureaus. All interested parties were given the opportunity to submit their views and comments in writing by November 30, 1976.

BACKGROUND

The development and adoption of a USOA is responsive to finding 6 in *Rate Bureau Investigation*, 349 I.C.C. 811, affirmed 351 I.C.C. 437. In that proceeding, the Commission concluded among other things, that an accounting system should be prescribed for carrier ratemaking organziations (commonly referred to as rate bureaus) operating pursuant to agreements approved under section 5a and 5b of the Interstate Commerce Act (49 U.S.C. 5b and 5c).

The Commission is commencing an accelerated field monitoring program of rate bureaus in order to assure their compliance with the procedures contained in their respective agreements. A uniform accounting system is essential to this monitoring effort. Collecting and reporting the necessary financial data in a uniform manner will provide a more accurate and detailed view of the overall operation and financial condition of ratemaking organizations.

It is clear that the public interest will be served by the adoption of a USOA for rate bureaus and that the reporting burden imposed on ratemaking organizations will be minimal. Under the proposed rules, rate bureaus and conferences with annual operating revenues of $100,000 or more would be required to maintain the USOA. The $100,000 revenue guideline will insure maintenance of needed data without imposing an undue burden on smaller bureaus.

REPRESENTATIONS

A list of the parties that submitted statements in this proceeding is set forth in appendix B.

The Western Railroads Traffic Association (WRTA) has expressed strong opposition to the requirement of the proposed rules that each bureau prepare a trial balance of the general ledger accounts at the close of each month and at the end of the calendar year.

Respondents contend that due to the manner in which WRTA rate organizations derive their financial support, the information that would be obtained from a separate statement of balance sheet accounts for each organization is irrelevant to their operations and would be of little use to the Commission. WRTA argues that to require that separate balance sheet accounts be kept for each WRTA organization will make it necessary to completely redesign the accounting system now being utilized, and that such an effort would entail an unduly burdensome expenditure.

The Southern Ports Foreign Freight Committee (SPFFC) concurs with the comments made by the WRTA. Additionally, they specifically request that the Commission not require them to report their assets and liabilities on an individual basis, but that reporting on a consolidated basis with WRTA, as done in the past, be allowed.

The Association of American Railroads (AAR) argues that the proposed USOA not be made applicable to Section 5b Application Nos. 7 and 8, ***Railroads Per Diem, Mileage Demurrage and Storage Agreement*** and ***Railroads Per Diem and Mileage Rates for Trailers and Containers Agreement***. It contends that implementing the proposed USOA with regard to these bureaus would be of little use since neither of these agreements provides for any accounts, membership fees, dues or assessments, and neither employs any officers or other employees. Further the administrative expenses for both included in an inseparable account for the Operating-Transportation Division of the AAR. The operations of these two agreements are alleged to be so unrelated, both in form and substance, to the operations of other ratemaking organizations, that they should be exempt from the USOA.

The Rocky Mountain Motor Tariff Bureau (RMMTB) has expressed the view that the proposed USOA is generally adequate. However, certain amendments were proposed in order to more accurately reflect actual existing conditions. These changes include the realignment of several other accounts, the addition of "Land" and "Special Funds" accounts, and the change in the makeup of several accounts including "Working Funds," "Operating Revenues," and "Filing Fees."

The National Classification Committee (NCC) has, in its filing, specifically adopted those views expressed by RMMTB as their own. Additionally, NCC requests that alternative accounting periods, other than those proposed, be allowed. More specifically, it wishes to continue its current fiscal year basis of bookkeeping.

The Southern Motor Carriers Rate Conference (SMCRC) has filed its views, finding the proposed USOA generally acceptable. Additionally the SMCRC suggests that several additional accounts be added, including "Land," "Meeting Room Expense," and "Traffic Study Expense."

The Middle Atlantic Conference (MAC) has found the USOA to be proper and correct as proposed, and asks only that an accounting period based on a fiscal year beginning June 1 and ending May 31, be allowed. This would allow them to continue their bookkeeping on a fiscal year basis as currently done.

The Middlewest Motor Freight Bureau (MFB) takes no exception with the system of accounts or its underlying concepts as presented. However, it contends that the simple system of accounts currently in effect is adequate and that there has been no balancing of real benefits and costs associated with the new system.

The Movers' & Warehousemen's Association of America (MWAA) and the Household Goods Carriers' Bureau (HGCB) have presented similar views. They contend that the adoption the proposed USOA would present an unnecessary expense which must be borne by member carriers. Additionally it is suggested that those bureaus receiving membership dues of less than $3 million per year be permitted to continue their present accounting systems and file only their profit and loss statement and balance sheet certified by a CPA, along with their annual report Form RBO. Quarterly trial balances rather than monthly are also requested. Additional minor changes were suggested regarding the make-up of several accounts.

Central and Southern Motor Freight Tariff Ass., Inc. (CSMFTA) has responded that it has no objection to the concept of a USOA for rate bureaus. However several amendments to the account makeup relating to "Bulletin fees," "Tariff fees," and "Participation fees" accounts were proposed. Also proposed was the addition of a "Land" account to the asset accounts.

The Central States Motor Freight Bureau, Inc. (CSMFB), and The National Industrial Traffic League (NITL), in their pleadings, have expressed agreement with the Commission's purpose in this proceeding as well as the opinion that the promulgation of a uniform system will be advantageous not only to the Commission and rate bureaus, but also the carrier principals of the bureaus.

However, CSMFB has disagreed with some of the coding schemes employed by the USOA and has suggested some minor revisions to the account texts as well as the addition of a "Land" account.

DISCUSSION AND CONCLUSIONS

This rulemaking proceeding has been initiated pursuant to the findings made in Ex Parte No. 297, *Rate Bureau Investigation*, 349 I.C.C. 811, which established the need to prescribe a uniform system of accounts for rate bureaus. Therein the Commission found that a uniform system of accounts would "*** facilitate the comparison of reported financial information *** provide assurance that information is accumulated, accounted for and reported in a consistent manner, and provide a reasonable means of accumulating concise and comparable statistical data." There was no significant opposition on the record in that proceeding to the prescription of such a system. Nor have convincing reasons been offered here why such a system should not be prescribed.

Currently, rate bureaus are only required to file the annual report Form RBO. This form contains a simplified reporting format and cannot be viewed as a substitute for a numerically coded chart of accounts, account definitions, instructions, and interpretations of accounting transactions. The Form RBO is only a reporting mechanism, not an alternative to the proposed USOA.

We disagree with the contentions of some parties in this proceeding that the adoption of the USOA is unnecessary. The effective regulation of carriers has necessitated the adoption of uniform system of accounts for the various modes subject to Commission jurisdiction.[1] Similarly, the effective regulation by the Commission of rate bureau activities requires the adoption of the USOA.

In our view, the Form RBO is no longer adequate. As stated in Ex Parte No. 297, *supra*, increased surveillance of rate bureaus is necessary. Respondents should be cognizant of the fact that they are beneficiaries of an exemption from the antitrust laws. Such an exemption is only warranted where the advantages to the public interest, through furtherance of the national transportation policy, are such as to outweight the disadvantages to the public interest intended to be guarded against by the antitrust laws. Where such immunity has been granted, the rate bureaus should not be heard to complain with regard to our adoption of a USOA which will enable the Commission to better perform its oversight responsibilities.

REVISIONS TO ACCOUNTS

We have reviewed the recommendations submitted for revision of the instructions, accounts, and account texts. Some of the suggested changes would have either complicated the basic structure of the USOA or conflicted with generally accepted accounting principles (GAAP). Those revisions which we felt would facilitate interpretations, improve functional relationships and more closely align the USOA with GAAP have been incorporated in the final system (appendix A). For example, instruction 2-Records, was revised to provide bureaus the option of adopting the proposed account coding scheme; instruction 2(b) is modified to relieve bureaus from having to provide receipts for minimal items; accounts 1215, Land, and 1330, Special Funds, were added, and account text terminology such as "working funds" and "fees charges" were changed to "net worth" and "assessments" at the request of the respondents.

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[1] Most recently, by report *Uniform System of Accounts for Railroads*, 361 I.C.C. 120 (1977), the Commission extensively revised the system of accounts for railroads. Petitions for reconsideration were denied by order dated November 15, 1977.

REVENUE CLASSIFICATION GUIDELINES

The revenue classification guideline proposed in the NPR, served October 14, 1976, requires the implementation of the USOA on all bureaus generating annual operating revenues of $100,000 or more. Some bureaus have expressed opposition to this classification guideline, contending that it would be too burdensome for some smaller organizations to adopt the USOA. Instead, several respondents recommended that we adopt the $3 million classification guideline used by motor carriers of property.

The purpose of establishing the revenue classification is to minimize the accounting burden for smaller bureaus for which implementation of the USOA would be burdensome. However, to achieve the overall objectives of the USOA, we must insure that a large percentage of the bureaus, both in terms of numbers and financial stature, comply with the USOA. We have reviewed the annual operating levels reported by all bureaus filing annual report Form RBO in 1974 and 1975, and have found that while only 5 percent of all the bureaus regulated by the Commission have revenues in excess of $3 million, approximately 40 percent have revenues in excess of $100,000. To set the classification guideline at the $3 million level would not further the Commission's objective of providing uniformity for bureau monitoring purposes. After assessing the impact of several levels of classification guidelines, we have concluded that the proper level is $100,000.

Several questions have been raised concerning the reasonableness of the effective date proposed in NPR. In order to provide some lead time for implementation and development of appropriate conversion tables, the effective date has been changed to the year beginning January 1, 1978.

FISCAL YEAR ACCOUNTING

Several recommendations have been received to give rate bureaus the option of maintaining the USOA on a fiscal year basis while posting, summarizing, and analyzing accounts on a quarterly basis.

Although the USOA requires that bureaus maintain accounts on a calendar year basis for Commission purposes, they are not precluded from maintaining separate accounts for managerial purposes on a fiscal year basis in addition to the USOA. It is not uncommon for carriers in various modes regulated by the Commission to maintain their accounts and reports in this manner. The calendar year basis is necessary to ensure the uniformity in accounting instructions and facilitate the summarization of annual report data reported to the Commission.

The USOA also requires that accounting transactions be posted, summarized, and analyzed on a monthly basis. The monthly accounting cycle was adopted because it will provide uniformity in accounting and because it is the most widely used cycle among bureaus that will be subject to the USOA. If the monthly accounting cycle imposes any undue administrative burdens, any bureau may file for relief, with good cause, on an individual basis.

The recommendation has been made that the Commission accept certified balance sheet and a profit and loss statement of smaller rate bureaus in lieu of a prescribed system of accounts. We can only repeat that our objective in implementing the USOA is to promote uniformity in the manner in which financial data is maintained to aid Commission monitoring of bureaus. To allow a substitute accounting form by any bureau that is otherwise subject to implementation of the USOA pursuant to this proceeding would serve to contravene that objective. We must, therefore, conclude that the submission of balance sheet and profit and loss statements in lieu of USOA by bureaus otherwise subject to the implementation of the USOA is not feasible.

CONSOLIDATED ACCOUNTING AND SPECIFIC EXEMPTIONS

WRTA opposed the USOA because it will require a significant accounting system change for its component members. It maintains asset, liability, and equity accounts of its component members on a consolidated basis. Although separate records of receipt and disbursements are maintained, these WRTA members cannot comply with instruction 3 or maintain the aforementioned accounts without a major systems revision. It is contended that such a revision of the accounting system will cost a substantial amount and constitute an excessive and an unnecessary burden for component members. The AAR posed a similar request for its section 5b rate committees. It contends that these committees should be exempt from compliance with the USOA due to their unique financing, organizational structure, and scope of operations. The Commission recognizes the unique nature of these problems: however, we repeat our finding that compliance is necessary. If WRTA or AAR believe the cost of compliance to be too great, they have the option of restructuring their organizational method of operation or their financial arrangements. Antitrust immunity is not granted lightly, and effective regulation of rate bureaus by the Commission is essential. As we have indicated, the adoption of the USOA will assist us in this regulation.

While requests for exemption from compliance with the USOA are not foreclosed, request will be granted only in extraordinary situations. On this record WRTA and AAR have failed to demonstrate a need for an exemption or that such an exemption would be in the public interest.

FINDINGS

We find that implementation of the proposed Uniform System of Accounts will provide uniformity in the manner in which financial data is maintained by rate bureaus and aid the Commission in its continuing monitoring and inspection of rate bureaus.

We further find that the prescribed Uniform System of Accounts as set out in appendix A is sound, equitable, reasonable, and necessary, and should be adopted as specified in the attached order.

And we further find that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER CHRISTIAN, concurring:

I am in full agreement with the views stated in the report. However, I believe the Commission should have complied with the provisions of section 17(9)(e) concerning an extension of time and report to Congress, since it is my view that Congress intended the section 17(9)(b) deadline to be applicable to this situation. It would be anomalous indeed to impose strict time deadlines on subordinate agency bodies but to eliminate all deadlines in those cases where the Commission, because of the importance of the issues or the need for expedition, issues the decision itself in the first instance.

APPENDIX A

PART 1211-RATE BUREAUS

Under Title 49 (CFR) Part 1211, add the following instructions, definitions, chart of accounts, and account texts:

RATE BUREAU INSTRUCTIONS
1. Classification of bureaus
2. Records
3. Accounting period
4. Charges to be just and reasonable
5. Interpretations of prescribed accounting
6. Long-term obligations
7. Extraordinary, unusual or infrequent items, prior period adjustments and accounting changes.

CHART OF ACCOUNTS
BALANCE SHEET ACCOUNT EXPLANATIONS

CHART OF ACCOUNTS - REVENUE AND EXPENSES
REVENUE AND EXPENSE ACCOUNT EXPLANATIONS

FORM OF STATEMENT OF FINANCIAL POSITION

FORM OF STATEMENT OF RESULTS OF OPERATIONS

DEFINITIONS

1. "Accounts," means the accounts prescribed in this system of accounts.

2. "Amortization," means the gradual reduction of an amount in an account by prorating such amount over either a fixed period dependent on the requirements of regulatory bodies, life of the asset or liability to which it applies or over the period of anticipated benefit.

3. "Bureau," means a rate bureau or conference subject to Sections 5a and 5b of the Interstate Commerce Act, 49 U.S.C. 5b and 5c.

4. "Commission," means the Interstate Commerce Commission.

5. "Current assets," means cash as well as those assets that are readily convertible into cash or are held for current use in operations or construction; current claims against others, payment of which is reasonable assured; and other amounts accruing to the bureaus which are subject to settlement within one year from the date of the current financial statements or upon demand.

6. "Current liabilities," means those obligations the amount of which is definitely determined or closely estimated which are either matured or become due within one year from date of the current financial statements or assumption or upon demand.

7. "Long-term obligations," means obligations having a life of more than one year, from the date of creation or assumption, which will not be paid within one year from the date of the current financial statements.

RATE BUREAU INSTRUCTIONS

1. Classification of bureaus.

(a) For purposes of accounting regulations, bureaus are grouped into the following classes:

Class I: Bureaus having annual operating revenues of $100,000 or more.
Class II: Bureaus having annual operating revenues of less than $100,000.

(b)(1) The class to which any bureau belongs shall be determined by annual operating revenue. If, at the end of any calendar year, such annual operating revenue is greater than the maximum for class II, the bureau shall adopt the accounting requirements of class I. A class II bureau's adoption of class I classification shall be effective as of January 1 of the second succeeding year. Only class I bureaus will be required to maintain the prescribed uniform system of accounts.

(2) If, at the end of any calendar year, a bureau's annual operating revenue is less than the minimum of class I, and has been for three consecutive years, the bureau shall adopt class II status effective January 1 of the following year.

(3) Bureaus shall notify the Commission of any change in classification by completing and returning the Classification Form by October 31.

(4) Any bureau which begins operations shall be classified in accordance with a reasonable estimate of its annual operating revenues.

(5) When a business combination occurs, such as a merger, reorganization, or consolidation, the surviving bureau shall be reclassified effective January 1 of the next calendar year on the basis of the combined revenue for the year when the combination occurred.

(6) In unusual circumstances, where the classification regulations will unduly burden the bureau, the bureau may request the Commission for an exception to the regulations. This request shall be in writing specifying the conditions justifying an exception.

2. Records.

(a) All of the accounts prescribed in this system of accounts shall be kept when applicable and entries recorded by the double entry method. Each account in the general or subsidiary ledgers shall reflect the prescribed account number. In circumstances where use of or conversion to the prescribed account coding scheme is impractical, the bureau may continue to use its coding scheme provided that an adequate conversion system is developed to assist Commission personnel in the review and inspection of bureau accounting records. Account titles shall clearly indicate the type of items included if the exact titles prescribed herein are not used.

(b) Each bureau shall keep its general accounting books, and all other books, records, and memoranda which support in any way the entries to such accounting books, and analyses of general ledger account balances, readily accessible so that it can furnish at any time full information as to any account. Moreover, the month, day, year, and posting reference shall be shown for each entry in the general ledger and subsidiary records and entries shall be supported with detailed information that will provide a ready analysis and verification of the facts recorded therein. All expenditures, including the expense account of officers and employees, shall be supported by vouchers, payrolls, receipted bills, canceled checks, receipts for petty cash payments, or other evidences of the expenditures to the extent practicable.

(c) The books referred to herein include not only books of accounts in a limited technical sense but all other records such as minute books, stock books, reports, correspondence, and memoranda which will be useful in developing the history of or facts regarding any transaction.

(d) Bureaus shall not destroy any books, records, or memoranda which support entries to their accounts unless the destruction thereof is specifically provided for in the regulations to govern the destruction of records. (Part 1253 of this chapter.)

(e) Subdivision of any account in this sytem of accounts may be kept, provided that such subdivisions do not impair the integrity of the accounts prescribed. The Commission reserves the right to order any bureau to subdivide any account in this system of accounts. The title of each such subdivision shall clearly indicate the account of which it is a part. Each subdivision of a prescribed account may be identified by a suffix to the prescribed account number. When an account is subdivided in the general ledger, an account need not be maintained for the total of the subdivisions. When such subdivisions are carried in subsidiary ledgers, however, the general ledger shall contain the controlling accounts therefor so that a complete general ledger trial balance may be obtained.

3. Accounting period.

(a) Each bureau shall keep its books on the basis of either (1) an accounting year of 12 months ending on the 31st day of December in each year, or (2) an accounting year of thirteen 4-week periods ending at the close of the last seven days of each calendar year.

(b) A bureau electing to adopt an accounting year of thirteen 4-week periods shall file with the Commission a statement showing the day on which its accounting year will close. A subsequent change in the accounting period may not be made except by authority of the Commission.

(c) To avoid repetition, wherever "calendar year" appears in this system of accounts it is intended to also mean "or an accounting year of thirteen 4-week periods" and wherever "month" appear it is intended to also mean "or 4-week period."

(d) For each month all applicable transactions, including full accruals, shall be entered in the books of original entry and posted to the general ledger. A trial balance of the general ledger accounts shall be prepared at the close of each month setting out the account number, title, and amount of each ledger account. (Mechanical, electronic or automatic data processing equipment producing printouts that are the equivalent of manually prepared trial balances shall identify balances by account numbers.) At the close of calendar year, revenue, expense, and other income accounts shall be closed and the balance sheet account balances shall be brought forward to the general ledger for the succeeding year.

(e) The final entries for any month shall be made in the general ledger not later than 60 days after the last day of the month for which the accounts are stated, unless otherwise authorized by the Commission. The period which the final entries for the last month of the calendar year shall be made may be extended to such date in March of the following year as shall not interfere with the preparation and filing of annual reports.

(f) No changes shall be made in the accounts for annual reports that have been filed with the Commission unless the changes have first been authorized by the Commission.

4. Charges to be just and reasonable.

All charges to operating revenues, operating expenses, and other bureau expenses prescribed in this system of accounts shall be just, reasonable and not exceed amounts necessary for the honest and efficient operation and management of the bureau. Payments shall not exceed the fair market value of goods and services acquired in an arm's-length transaction. Any payments in excess of such just and reasonable charges shall be included in other revenues or expenses.

5. Interpretation of prescribed accounting.

(a) The cross-reference included in, and notes following, the texts of various instructions and accounts are for the purpose of indicating the applicable provisions of other sections. Such references are not to be construed as comprising a complete list of the instructions relating to a particular subject, since the definitions, the general instructions, and the texts of each account must be given consideration in determining the prescribed accounting.

(b) All questions of doubtful interpretation of the prescribed system of acccounts shall be submitted by responsible accounting officials to the Commission for consideration and decision.

6. Long-term obligations.

When evidences of debt (other than unsecured advances payable) which do not mature within one year from date of issuance are issued or assumed, the face amount of such evidences of debt shall be recorded in the acount captioned, "Long-term obligations."

7. Extraordinary, unusual or infrequent items; prior period adjustments; and accounting changes.

(a) *Extraordinary Items.* (1) All items of profit and loss recognized during the year are includible in ordinary income unless evidence clearly supports their classification as extraordinary items. Extraordinary items are characterized by both their unusual nature and infrequent occurrence taking into account the environment in which the bureau operates; they must also meet the materiality standard.

(2) Unusual means the event or transaction must possess high degree of abnormality and be of a type clearly unrelated, or only incidentally related, to the ordinary and typical activities of the entity.

(3) Infrequent occurrence means the event or transaction shall be of a type not reasonably expected to recur in the foreseeable future.

(b) *Unusual or Infrequent Items.* Material events unusual in nature or infrequent in occurrence but not both, thus not meeting both criteria for classification as extraordinary, shall be included in the accounts provided as separate components of income/expense from continuing operations. Such items are not to be reported net of income taxes.

(c) *Prior Period Adjustments.* Adjustments occurring in the current accounting period, relating to events or transactions which occurred in a prior period, the accounting effects of which could not be determined with reasonable assurance at that time, shall be reported as prior period adjustments. A prior period adjustment should be reported by restating the beginning balance of retained earnings of the current year and corespondingly adjusting related prior year balances presented for comparative purposes. Such adjustments shall not be considered prior period unless: (1) they can be specifically identified with the directly related to the business activities of particular prior periods, (2) are not attributable to economic events occurring subsequent to the date of the financial statements for the prior period, (3) depend primarily on determinations by persons other than management, (4) were not susceptible of reasonable estimation prior to such determination, and (5) they are material. If an adjustment does not meet such criteria, it shall be separately disclosed as to year of origin, nature, and amount and classified in the current period in the same manner as the original item. If the adjustment is the correction of an error, it shall be reported as a prior period adjustment.

(d) *Accounting Changes.* A change in accounting principle or accounting entity should be referred to this Commission for approval. The cumulative effect of a change in accounting principle should ordinarily be reflected in the account provided for in determining net income; in certain cases accounting changes may be reflected as prior period adjustments. Changes in accounting estimates should ordinarily be reflected prospectively.

(e) *Materiality.* As a general standard an item shall be considered material when it exceeds 10 percent of annual income (loss) before extraordinary items. An item may also be considered in relation to the trend of annual earnings before extraordinary items or other appropriate criteria. Items shall be considered individually and not in the aggregate in determining materiality. However, the effects of a series of related transactions arising from a single specific and identifiable event or plan of action shall be aggregated to determine materiality.

(f) *Commission Approval and Accountant's Letter.* Items shall be included in the accounts provided for extraordinary items, unusual or infrequent items, prior period adjustments and cumulative effect of changes in accounting principles only upon approval of the Commission. If the bureau retains the service of an independent accountant, a request for using these accounts shall be accompanied by a letter from the independent accountant approving or otherwise commenting on the request.

NOTE: The bureau may refer to GAAP for further guidance in applying Instruction 7.

RATE BUREAU CHART OF ACCOUNTS

Assets

1010	Regular and payroll deposits
1020	Special deposits
1030	Petty cash
1040	Short-term investments
1045	Notes receivable
1050	Accounts receivable—trade
1060	Accounts receivable—other
1070	Allowance for doubtful accounts
1080	Prepayments
1090	Supplies inventory
1200	Other current assets
1215	Land
1220	Buildings
1230	Accumulated depreciation
1240	Furniture, fixtures and equipment
1250	Accumulated depreciation
1260	Vehicles
1270	Accumulated depreciation
1280	Other
1290	Accumulated depreciation

1300	Leasehold improvements
1310	Accumulated amortization
1320	Deferred charges
1330	Special funds
1340	Other assets

Liabilities

2010	Notes payable
2020	Accounts payable
2030	Payroll taxes payable
2040	Employee benefits payable
2050	Accrued liabilities
2060	Membership applications pending
2070	Dues and assessments collected in advance
2080	Deferred credits
2090	Long-term obligations

Member Equity

3010	Net worth

Operating Revenues

4100	Member assessments
4200	Admission fees
4300	Bulletin fees
4400	Tariff fees
4500	Participation fees
4600	Quotation fees
4700	Other

Operating Expenses

5010	Salaries and wages
5020	Payroll taxes
5030	Employee benefits
5040	Professional services
5050	Depreciation
5060	Amortization
5070	Outside printing
5080	Operating supplies
5090	Postage and mailing fees
5100	Rate committee
5110	Utilities and communication services
5120	Rents
5130	Travel and entertainment
5140	Uncollectible accounts
5150	Insurance
5160	Property and other taxes
5170	Miscellaneous

Other Revenues

4810	Interest
4820	Gain on asset disposition

4830 Extraordinary, unusual or infrequent items, and accounting changes

Other Expenses
5210 Interest
5220 Loss on asset disposition
5230 Extraordinary, unusual or infrequent items, and accounting changes

RATE BUREAUS TEXT OF ACCOUNTS

Assets

1010 *Regular and payroll deposits:* This accounts shall include all deposits in banks or trust companies (including savings accounts) available on demand for paying general Bureau obligations and payrolls.

1020 *Special deposits:* This account shall include bank deposits subject to withdrawal for specific purposes only, and cash and bank credits placed in the hands of fiscal agents or others for special purposes (other than the payments of interest or dividends), such as deposits with Federal, State, or municipal authorities, public utilities, insurance companies, or others, as a guaranty for the fulfillment of current obligations. Entries to this account shall specify the purpose for which the deposit is made.

1030 *Petty cash:* This account shall include amounts advanced to officers, agents, employees and others as petty cash or working funds of a continuing nature from which certain expenditures are to be made and accounted for.

1040 *Short-term investments:* This account shall include the book cost of investments such as time drafts and loans receivable, marketable securities and similar investments acquired for the purpose of temporarily investing cash. Any securities included in this account must be of such a nature as to be readily convertible into cash at substantially their book value.

1045 *Notes receivable:* This account shall include the current book cost of collectible obligations in the form of notes receivable or similar evidences of money receivable and all interest accrued on such receivables.

1050 *Accounts receivable—trade:* This account shall include amounts currently due for membership dues, bulletin fees, tariff fees, supplements, participation and quotation fees.

1060 *Accounts receivable—other:* This account shall include amounts currently due from employees and others for advances, loans and other short-term indebtedness.

1070 *Allowance for doubtful accounts:* This account shall include amounts specifically or systematically reserved from receivables which may become uncollectible.

1080 *Prepayments:* This account shall include amounts paid or incurred in advance for insurance, taxes, postage, interest and other expenses, the benefits of which are to be realized in subsequent periods.

1090 *Supplies inventory:* This account shall include the cost of all unused printing, mailing and office supplies used in Bureau operations. Inventories of materials and supplies should be taken on intervals of one year or less and appropriate adjustments should be made to bring this account into agreement with actual physical inventory.

1200 *Other current assets:* This account shall include the cost of all other current assets not specifically provided for elsewhere.

1215 *Land:* This account shall include the cost of land acquired for the purpose of carrying out bureau functions. This should exclude the cost of buildings provided for in Account 1220.

1220 *Buildings:* This account shall include the cost of buildings and structures and any fixtures permanently affixed thereto.

1240 *Furniture, fixtures and equipment:* This account shall include the installed cost of furniture, fixtures, appliances and equipment used in bureau operations.

1260 *Vehicles:* This account shall include the total cost of all vehicles purchased and used by the bureau.

1280 *Other:* This account shall include the cost of all other depreciable assets used in bureau operations.

1230 *Accumulated depreciation:* An accumulated depreciation account should be
1250
1270 maintained for each property or equipment classification and include the amount
1290 of cost charged to expense as depreciation during the current and prior periods.

1300 *Leasehold improvements:* This account shall include the initial cost and subsequent additions and betterments to property held under lease by the bureau.

1310 *Accumulated amortization:* This account shall include the cost of leasehold improvements charged to expense as amortization.

1320 *Deferred charges:* This account shall include all charges of a deferred nature which are to be subsequently amortized to expense.

1330 *Special funds:* This account shall include the amount of cash and cost of securities and other assets which have been specifically set aside to provide a fund for the replacement of depreciable property or other special purposes.

1340 *Other assets:* This account shall include the long-term portion of all other assets not specifically provided for elsewhere. This account will include investments in marketable securities and notes maturing later than one year from the date of the current financial statements; cash surrender values of life insurance policies on the lives of officers and employees; accounts receivable not subject to current settlement; costs incident to organization.

Liabilities and Equity

2010 *Notes payable:* This account shall include the current portion of outstanding obligations in the form of notes, drafts, acceptances, advances, loans and similar evidences of indebtedness. This account shall also include all accrued interest currently payable on the aforementioned obligations.

2020 *Accounts payable:* This account shall include amounts payable to others that are subject to current settlement, for materials and supplies, services received, matured rents and related services.

2030 *Payroll taxes payable:* This account shall include undeposited FICA, Federal, state and city income taxes withheld from employees.

2040 *Employee benefits payable:* This account shall include amounts withheld and payable for employee life insurance, hospitalization, pension or retirement contributions, bond allotments and other employee benefits.

2050 *Accrued liabilities:* This account shall include amounts accrued for salaries, payroll taxes, employee benefits and all other expenses.

2060 *Membership applications pending:* This account shall include amounts received from prospective members in advance of the effective date of their membership.

2070 *Assessments collected in advance:* This account shall include dues and assessments received in advance from active members.

2080 *Deferred credits:* This account shall include all other credits of a deferred nature which are subsequently to be amortized.

2090 *Long-term obligations:* This account shall include the long-term portion of outstanding obligations in the form of notes, drafts, acceptances, advances, loans and similar evidences of indebtedness.

3010 *Net worth:* This account represents the net worth of the Bureau or Conference and shall include the excess of revenues over expenses or expenses over revenues for the accounting period. Subsequent distributions of over assessments to members should be charged to this account.

Operating Revenues

4100 *Member assessments:* This account shall include all assessments to members on a regular basis for general expenses and services not charged for on a specific basis. It shall also include charges for watching services.

4200 *Admission assessments:* This account shall include one-term admission fees assessed to new members and members reinstated after suspension or cancellation of prior memberships. This account shall be debited for refunds or credit memos issued for adjustments.

4300 *Bulletin assessments:* This account shall include all fees assessed to subscribers for bulletin service fees.

4400 *Tariff fees:* This account shall include all fees asessed to subscribers for tariff printing and distribution services, tariff supplements, extra copies of tariffs to members above their regular allotment, and division sheets.

4500 *Participation assessments:* This account shall include all fees assessed to carrier non-members to participate in bureau tariffs.

4600 *Quotation assessments:* This account shall include all fees assessed to non-members for preparation and distribution of additional quotations.

4700 *Other:* This account shall include all other operating revenues not specifically provided for elsewhere.

Operating Expenses

5010 *Salaries and wages:* This account shall include amounts paid and accrued for gross salaries and wages of executives, supervisory, clerical and other personnel.

5020 *Payroll taxes:* This account shall include FICA, unemployment and other payroll taxes paid and owed to Federal and state taxing authorities.

5030 *Employee benefits:* This account shall include the net payments (premiums or contributions less dividends or refunds) to trustees or commercial insurance companies for retirement benefits, payments made directly to retired employees, and payments for other payroll related benefits.

5040 *Professional services:* This account shall include amounts paid for advisory and consulting services relating to non-routine business decisions. This account shall include fees for accounting, legal, auditing and consulting services.

5050 *Depreciation:* This account shall include the cost of buildings, furniture, fixtures, equipment, vehicles and all other depreciable assets charged to expense during the current accounting period.

5060 *Amortization:* This account shall include the cost of leasehold improvements and other assets charged to expense as amortization during the current accounting period.

5070 *Outside printing:* This account shall include all printing costs paid to outside vendors.

5080 *Operating supplies:* This account shall include the cost of paper, cards, tapes, envelopes and other supplies used in data processing and regular business operations.

5090 *Postage, mailing and distribution:* This account shall include all postage, mailing and distribution fees related to tariffs, bulletins and other special matters.

5100 *Rate committee expense:* This account shall include all charges directly related to rate meetings and other carrier functions such as Board of Directors and Membership meetings.

5110 *Utilities and communication services:* This account shall include the cost of heat, light, power, telephone, telegraph and other related services used in Bureau operations.

5120 *Rent:* This account shall include charges for leased or rented offices, vehicles and equipment used in Bureau operations.

5130 *Travel and entertainment:* This account shall include the cost of traveling and entertaining for the benefit of the Bureau. Items included in this account shall include, but are not limited to, automobile allowances, banquets, conventions, hotels, meals, meetings, public transportation fees and business gifts.

5140 *Uncollectible accounts:* This account shall include all expenses incurred and related to uncollectible accounts receivable.

5150 *Insurance:* This account shall include the net cost (premiums less dividends or refunds) of property, liability and other insurance coverage. This account shall also include the amount of prepaid insurance premiums amortized to insurance expense during the accounting period.

5160 *Property and other taxes:* This account shall include charges for real estate, personal property and other miscellaneous taxes and licenses assessed by governmental organizations.

5170 *Miscellaneous:* This account shall include charges related to the publication and filing of tariffs and supplements with government agencies, bank fees, deliveries, repairs and maintenance and other expenses not specifically provided for elsewhere.

Other Revenues

4810 *Interest:* This account shall include interest accruing and earned upon securities of other companies; Federal, state and municipal governments; loans, notes, advances, special deposits and all other interest bearing assets.

4820 *Gain on asset dispositions:* This account shall reflect the gains recognized on dispositions of depreciable and non-depreciable Bureau assets.

4830 *Extraordinary, unusual or infrequent items and accounting changes:* This account shall include gains from extraordinary, unusual or infrequent items and accounting changes in accordance with the text of Instruction 7.

Other Expenses

5210 *Interest:* This account shall include interest and finance costs charged by banks, lending institutions, and other sources on Bureau indebtedness.

5220 *Loss on asset dispositions:* This account shall reflect the losses recognized on sales, retirements or trade-ins of depreciable and non-depreciable assets.

5230 *Extraordinary, unusual or infrequent items and accounting changes:* This account shall include losses from extraordinary, unusual or infrequent items and accounting changes in accordance with the text of Instruction 7.

GENERAL FORM OF STATEMENT OF FINANCIAL POSITION

ASSETS

Current Assets:	
1010-1030	Cash
1045	Notes receivable
1050-1060	Accounts receivable
1070	Less Allowance for doubtful accounts
1040	Short term investments
1090	Prepayments
1200	Supplies inventory
1210	Other current assets
	Total Current Assets
Non-Current Assets:	
	Operating Properties:
1215	Land
1220	Buildings
1240	Furniture, fixtures and equipment
1260	Vehicles
1280	Other
	Total
1230, 1250, 1270, 1290	Less: Accumulated depreciation
1300	Leasehold improvement
1310	Less: Accumulated amortization
1320	Deferred charges
1330	Special funds
1340	Other assets

TOTAL ASSETS
LIABILITIES AND MEMBER EQUITY

Current Liabilities:	
2010	Notes payable—current
2020	Account payable
2030, 2040	Payroll taxes and benefits payable
2050	Accrued liabilities
2060	Membership application pending
2070	Assessments collected in advance
	Total Current Liabilities
Non-Current Liabilities:	
2080	Deferred credits

2090	Long-term obligations
	Total Liabilities

Member Equity:

3010	Net worth

TOTAL LIABILITIES AND MEMBER EQUITY

GENERAL FORM OF STATEMENT OF RESULTS OF OPERATIONS

Operating Revenues:

4100	Member assessments
4300	Bulletin assessments
4400	Tariff assessments
4500	Participation assessments
4600	Quotation assessments
4200	Admission assessments
4700	Other revenues

TOTAL OPERATING REVENUES

Operating Expenses:

5010	Salaries and wages
5020	Payroll taxes
5030	Employee benefits
5040	Professional services
5050	Depreciation
5060	Amortization
5070	Outside printing
5080	Operating supplies
5090	Postage, mailing and distribution
5100	Rate committee
5120	Rents
5150	Insurance
5110	Utilities and communication services
5160	Property and other taxes
5140	Uncollectible accounts
5130	Travel and entertainment
5170	Miscellaneous

TOTAL OPERATING EXPENSE

EXCESS (DEFICIT) OF OPERATING REVENUES OVER EXPENSES

Other Revenues:

4810	Interest
4820	Gains on assest dispositions
4830	Extraordinary, unusual or infrequent items, and accounting changes
	Other: (specify)

TOTAL OTHER REVENUES

Other Expenses:

5210	Interest

5220	Losses on asset dispositions
5230	Extraordinary, unusual or infrequent items, and accounting changes
	Other: (specify)

TOTAL OTHER EXPENSES
EXCESS (DEFICIT) OF REVENUES OVER EXPENSES

APPENDIX B

Association of American Railroads	(AAR)
Central and Southern Motor Freight Tariff Association	(CS MFTA)
Central States Motor Freight Bureau, Inc.	(CSMFB)
Household Goods Carriers Bureau	(HGCB)
Middle Atlantic Conference	(MAC)
Middlewest Motor Freight Bureau	(MMFB)
Movers and Warehousemen's Association	(MWA)
National Classification Committee	(NCC)
Rocky Mountain Motor Tariff Bureau	(RMMTB)
Southern Motor Carrier Rate Conference	(SMCRC)
Southern Ports Foreign Freight Committee	(SPFFC)
National Industrial Traffic League	(NITL)
Western Railroad Traffic Association	(WRTA)

ORDER

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER C - ACCOUNTS, RECORDS AND REPORTS
PART 1211 - RATE BUREAUS

NO. 32448 (SUB-NO. 1)

UNIFORM SYSTEM OF ACCOUNTS FOR RATE BUREAUS

Consideration has been given to the matters involved in this proceeding, and the Commission has made and filed a report containing its findings and conclusions, which report is made a part of this order.

It is ordered:

1. Part 1211 of Title 49 of the Code of Federal Regulations is amended to read as shown in appendix A.

2. The prescribed Uniform System of Accounts shall be effective for the year beginning January 1, 1978.

3. Service of this order shall be made on all rate bureaus; and to the Governor of every State and to the Public Utilities Commissions or Boards of each State having jurisdiction over transportation. Notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary, Interstate Commerce Commission, Washington, D.C., and by filing a copy with the Director, Office of the Federal Register for publication in the Federal Register.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

(Authority: 49 U.S.C. 5b, 5c, 12 and 20)

Decided December 1, 1977.

DECISION

EX PARTE NO. 342

PROCEDURES GOVERNING THE PROCESSING, INVESTIGATION AND DISPOSITION OF OVERCHARGE, DUPLICATE PAYMENT, OR OVERCOLLECTION CLAIMS

Decided August 15, 1978

Regulations adopted governing the investigation, processing, and disposition by motor carriers and freight forwarders of claims for overcharges, duplicate payments, and overcollection, including provisions for the written acknowledgment of claims, for a 60-day time limitation for their disposition, and for voluntary refund of overpayments discovered by carriers and not supported by claims.

We began this proceeding on our own motion by Notice of Proposed Rulemaking (NPRO),[1] entered September 29, 1977, and published in the Federal Register on October 7, 1977 (42 F.R. 54579). Our purpose is to consider the propriety of the practices of the Nation's motor common carriers of property and freight forwarders in the processing of overcharge, duplicate payment and overcollection[2] claims, and to determine if new rules are necessary to govern the processing of such claims in a more expeditious manner.

As indicated in the NPRO, this Commission has received and continues to receive numerous complaints from shippers, receivers, and their representatives regarding the practices of motor common carriers and freight forwarders in the processing of overcharge, duplicate payment, and overcollection claims. Essentially the complaints involve either a failure by motor carriers and freight forwarders to acknowledge such claims, or extended delays in the processing and disposition of such claims.

These practices not only frustrate the affected members of the public, but also impose upon this Commission an additional administrative burden which properly belongs with the carriers and forwarders. Moreover, the number of these complaints which has accelerated in recent years suggests that the carriers and forwarders have done little to alleviate this growing problem. We also pointed out that similar problems related to the processing of loss and damage claims generally have been alleviated by the Commission's adoption of regulations in Ex Parte No. 263, ***Loss and Damage Claims***, 340 I.C.C. 515, decided February 3, 1972.

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[1] Appendix A sets forth the proposed regulations.

[2] The term overcollection is used only in connection with household goods carriers as defined in section 1008.2(b) of the proposed regulations.

All motor common carriers of property and freight forwarders operating in interstate or foreign commerce subject to the Interstate Commerce Act were made respondents to this proceeding, and all interested parties were invited to participate. The Bureau of Investigations and Enforcement (BIE) of this Commission was authorized and directed to participate in this proceeding for the purpose of developing the record.

In response to the NPRO, 111 initial and 43 reply statements were filed in behalf of motor carriers, motor carrier associations, freight forwarders, household goods movers, freight auditing services, shippers, shipper organizations, and the BIE. Appendix B lists the parties submitting statements. The rules adopted and a notice of this action are set forth in appendix D.

JURISDICTION

In ***Loss and Damage, supra***, at page 539, we stated that a major question to be answered in that proceeding was whether this Commission had authority under the Interstate Commerce Act to promulgate and enforce procedures to be followed by regulated carriers, freight forwarders, shippers, and receivers of freight in the processing of loss and damage claims. We emphasized that we were not concerned with our jurisdiction to determine the merits of particular loss and damage claims since this Commission has consistently held that it does not have jurisdiction to determine the merits or measure of damages of particular loss and damage claims, those being cognizable only in the courts. Rather, we indicated our concern involved this Commission's jurisdiction and authority to prescribe reasonable procedures for the timely and efficient processing and disposition of loss, damage and other similar claims. We concluded that we had the requisite jurisdiction.

A similar conclusion is warranted in this proceeding. This is based, not only upon the general powers expressly conferred in various sections of parts II and IV of the act, but also upon those powers which, when considering the act as a whole, may reasonably be deemed to have been within the intention of Congress to confer upon the Commission when it enacted the statutes. Under sections 204(a)(6) and 417(a) of the act, 49 U.S.C. 304(a)(6) and 49 U.S.C. 1017, the Commission is empowered to enforce all provisions of part II and part IV of the act by adoption of appropriate rules and regulations.[3] Section 204(a) of part II of the act reads as follows:

> It shall be the duty of the Commission—
>
> * * * * * * *
>
> (6) To administer, execute, and enforce *all provisions* of this part, to make all necessary orders in connection therewith, and *to prescribe rules, regulations*, and procedure for such administration; (emphasis added).

It must be recognized that the Interstate Commerce Act is remedial legislation and the Commission may adopt regulations to carry out the policies of the laws which it administers where such regulations have a reasonable and rational basis. This is true even though no specific authority to promulgate regulations on the subject is contained in the law. See *Greyhound Corp.* v. *U.S.*, 221 F. Supp. 440, 444 (N.D. Ill. 1963) and cases cited therein.

Section 204(a)(6) of the act has been interpreted as reflecting the intention of Congress to vest the Commission with broad powers to promulgate such regulations as are required to enforce effectively part II of the act. *United States* v. *Resler*, 313 U.S. 57, 60 (1941); *Wycoff Company* v. *United States*, 240 F. Supp. 304, 308-309 (D. Utah, 1965). Sections 216(b) and 404(a) of the act, 49 U.S.C. 316(b) and 49 U.S.C. 1004(a), require motor common carriers and freight forwarders to establish, observe, and enforce just and reasonable regulations relating to their rates. We have relied on these statutory provisions not only in promulgating regulations for processing loss and damage claims (49 CFR 1005) but also in adopting regulations involving transportation of household goods in interstate and foreign commerce (49 CFR 1056).

Additional statutory authority is also found in sections 208(a) and 410(e) of the act, 49 U.S.C. 308(a) and 49 U.S.C. 1010(e), which provide that, from time to time, the Commission shall attach to the exercise of the privileges granted by the carriers' and forwarders' certificates and permits "such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require ***."

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[3] Under sections 204(7) and 403(e) of the act, the Commission is authorized and required to keep itself informed of transportation matters within its jurisdiction.

Finally, considering the mandate of the national transportation policy to promote economical and efficient service to encourage the establishment and maintenance of reasonable charges for transportation services, it is reasonable to conclude that the Commission may promulgate regulations for the expeditious processing of claims for overcharges, duplicate payment, and overcollection. The processing of these claims, as with loss and damage claims, constitutes an integral part of the total transportation service about which carriers are obligated to establish reasonable practices. Notwithstanding our lack of statutory authority to settle or adjudicate these claims, *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), we clearly have authority to prescribe reasonable and expeditious procedures for their handling.

MOTIONS

The Household Goods Forwarders Tariff Bureau requests that freight forwarders of household goods be exempted from having to comply with any regulations promulgated in this proceeding. Movers Round Table makes a similar request regarding household goods carriers. It argues that, even assuming all of the regulations are relevant to household goods carriers, it does not follow that a uniform requirement should be imposed on all types of carriers without regard to different carrier operations and accounting systems. Moreover, it points out that such differences have been recognized in numerous Commission proceedings as warranting separate and independent consideration. Movers Round Table asks that, if regulations are adopted despite its arguments, they be made applicable only to those household goods carriers, the operating revenues of which exceed $60 million for the most current accounting year.

It is evident in the wording of the proposed rule on applicability (section 1008.1), that the proposed regulations are intended to govern the processing of all claims for overcharge or duplicate payment for the transportation of property, including property handled by household goods carriers and freight forwarders. In addition a procedure is provided for overcollection, which is limited by definition to household goods transportation.

Section 1008.2(c) of the proposed regulations defines overcollection as receipt by a household goods carrier of a payment in excess of transportation charges applicable to a particular shipment of household goods (as defined in 49 CFR 1056.1) where no dispute between the parties exists as to the applicability of those charges. It provides that where a dispute does exist, the collection of excess amounts shall be treated as an overcharge, and, therefore, would be subject to the regulations for the processing of overcharges.

Since no adequate or sufficient reasons have been demonstrated for exempting household goods carriers and freight forwarders of household goods from the proposed regulations, their requests for this relief are denied.

Various shippers request that this proceeding be expanded to embrace railroad and water carriers. Essentially, they point out that the problems involved in the processing of claims are common to all modes of transportation and, in the interest of uniformity and fairness, rail and water carriers should be subject to the proposed regulations.

While we certainly would agree that uniform, efficient claims processing procedures are a desirable and necessary goal for all modes of transportation, we are not persuaded that broadening the scope of this proceeding to encompass rail and water carriers is advisable or appropriate at this time. We initiated this proceeding upon our own motion because of our growing concern with the increasing number of shipper complaints received by this Commission concerning problems of carrier failure to process and settle claims promptly. These complaints almost exclusively involve motor common carriers and freight forwarders. It is also apparent that the problems often involve simple errors which would require only minimal investigative effort.

In contrast, the incidence of complaints against rail and water modes are few and usually involve more complex disputes as to rate applicability or tariff provisions. We recognize that the great discrepancy between on the one hand, the large number of complaints received against motor carriers and freight forwarders and on the other hand, the much smaller number received against rail and water carriers may be attributable to the absence, under parts II and IV of the act, of provisions comparable to those under parts I and III which empower the Commission to issue orders specifically requiring rail and water carriers to make refund of overcharges due as well as to pay reparations. Moreover, these provisions have most likely served to induce rail and water carriers to settle claims on an expedited and informal basis. As pointed out by the BIE, no similar stimulus exists for settlement of claims against motor carriers and forwarders.

We believe that given the already voluminous record in this proceeding, the fact that the involved shipper complaints are filed almost exclusively against motor common carriers and freight forwarders, and the different nature of the problems involving each transportation mode, broadening this proceeding to embrace rail and water carriers is unwarranted. Our action does not, however, preclude the application of uniform claim processing rules to other modes, at anytime in the future, should this appear necessary or desirable.

Several shippers believe that collection agents such as Transport Clearings[4] should be bound by the regulations adopted in this proceeding. However, our jurisdiction regarding these entities is questionable. There is a serious question whether the Commission can exercise jurisdiction over these entities. In addition, the NPRO did not provide notice that such an action was under consideration. However, the respondents are bound by these regulations and their carrier responsibilities may not be avoided by using a clearinghouse or similar entity.

Numerous carrier respondents challenge the need for the proposed regulations by asserting the adequacy of the motor carrier industry's present claims handling procedures and the lack of sufficient data to substantiate the need for the proposed regulations. Some carriers have attempted to minimize the seriousness of the complaints received by the Commission by comparing (1) the percentage relationship between the number of complaints filed to the total number of shipments transported, or (2) the relationship between the number of complaints filed and the number of overcharge claims filed. For example, several carriers assert that the number of complaints received by the Commission involving overcharge, as shown in evidence submitted by the BIE,[5] is infinitesimal when compared to the volume of shipments handled, and, if anything, would indicate that the present carrier procedures are more than adequate. Movers Round Table, Ryder Truck Lines, Inc., and Frozen Food Express, Inc. have called for specific proof of the extent of the complaints received by the Commission.

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[4] Since the Commission has adopted rules and regulations with respect to extensions of credit to shippers by rail and motor common carrier, various facilities have been developed by independent agencies which are looked upon as being of assistance to both the carriers and the shippers in complying with those rules. One such facility is Transport Clearings, whose prime purpose is to factor the bills of its carrier members.

[5] A summary of data on overcharge handling complaints received by the Commission's Bureau of Traffic for the period of December 11, 1976, to November 25, 1977 is shown in appendix C.

The number of recorded complaints filed with this Commission can only be viewed as representative of the total of those made. Many instances of alleged dissatisfaction are reported orally and are informally handled. Furthermore, we believe that many shippers and receivers may be reluctant to complain formally because the time and expense involved in doing so may outweigh any benefit which might be received.

The record is replete with statements from virtually all shippers, freight auditing bureaus, and some carriers to the effect that claims processing procedures should be improved. Given this, and the number of complaints received-even if this number is assumed to be relatively small, as argued by certain carriers-we must conclude that this proceeding should not be discontinued. Accordingly, the requests by Movers Round Table, Ryder Truck Lines, Inc., and Frozen Food Express, Inc., for specific proof of the relative number of complaints received, when compared to the number of shipments transported, are denied.

STATUTE OF LIMITATIONS

Several carriers question the propriety of the existing statutes of limitations provided in section 204a(2) and 406a(2) of the act. They argue that the present three year statutory period for filing overcharge claims is excessive and is the primary cause of the time lag in handling claims. In proposing shorter statutory periods (suggested periods vary from 9 months to 1 or 2 year periods), it appears that the carriers' purpose is to reduce the cost of researching older records including tariffs, freight bills, bills of lading, and other shipping documents. It is asserted that a shorter statutory period would be better suited to modern business practices, and would result in savings to the carriers and ultimately to the shipping and receiving public as reflected in the carriers' freight rates.

Shippers National Freight Claim Council, Inc. (SNFCC), in recognition of a common carrier complaint that older claims require additional time to investigate, suggests that a more liberal time limitation for the investigation and disposition of such claims based upon the age of the shipment may be warranted as an alternative to the shortening of the overall statute of limitations, which it notes, was extended by Congress to 3 years.

Shippers basically oppose any action that would limit their rights to file claims. One shipper observes that many individual States permit longer time periods for the filing of claims on intrastate traffic.

This proceeding is not the appropriate forum to consider any changes in the existing statute of limitations. While the Commission can make recommendations, it has no authority to change the statute of limitations contained in the act. Moreover, we believe the proposed shorter statutory periods would be inconsistent with the underlying purpose of this rulemaking which is to foster prompt and equitable claims processing procedures.

DEFINITION OF TERMS

Section 1008.2(b), as proposed, defines duplicate payment to include:

> two or more payments, made in the exact amount of the published freight charges, for transporting the same shipment, where there is no dispute regarding the applicability of such charges, or the quality or quantity of the service performed.

It is suggested that this definition is unnecessarily restrictive in stating that duplicate payments arise only when two or more payments are made in the *exact amount* of the published freight charges. For example, a corrected freight billing issued by a carrier may be received after the original billing is paid. The corrected billing, for a different amount is also paid, thereby creating a duplicate payment although not in the "exact amount."

The definition of duplicate payment as proposed, was recently determined in *Duplicate Payment of Freight Charges,* 350 I.C.C. 513 (1975) wherein the Commission stated at page 515:

> [W]e have limited our definition of the term duplicate payment to its most simple, purest form. *** Analysis of the various instances in which a duplicate payment, as defined, may arise discloses one common element: through error or inadvertence on the part of either carrier(s), shipper(s), consignee(s), or their agent(s), a bill proper in all respects including rate applicability is paid two or more times.

Excluding examples of extension errors,[6] shipper payment of bills intended for another shipper, or shipper mistakes in payment due to misreading of the bill, the Commission in *Duplicate Payment, supra,* indicated that duplicate payments may occur in many ways, including, but not limited to the following:

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[6] Errors resulting from incorrect computation of the freight charges.

(1) The shipper or consignee pays the same freight bill more than once;

(2) The shipper pays both the originating and terminating carrier on an interline shipment;

(3) The shipper pays the carrier both directly and through another party, such as a bank participant in a freight payment plan, or a transport clearinghouse;

(4) The shipper pays a collect freight bill;

(5) The consignee pays a prepaid freight bill;

(6) The shipper makes a collect shipment in error. It detects the error, advises the carrier to rebill as prepaid, but the carrier collects from both the shipper and the consignee.

Although American Trucking Associations, Inc. (ATA) questions the propriety of reviewing the definition of duplicate payment, we believe that, for the purposes of this proceeding, an expanded definition to encompass the many instances in which a duplicate payment may occur must be included within the definition provided. Section 1008.2(b) will be revised to include the following definition of duplicate payment:

(c) "Duplicate payment" means two or more payments for transporting the same shipment. Where one or more payment is not in the exact amount of the applicable tariff rates and charges, refunds shall be made on the basis of the excess amount over the applicable tariff rates and charges.

For purposes of clarification this section shall also be amended to include the following additional definitions:

(a) "Carrier" means a motor common carrier or freight forwarder subject to part II or IV of the Interstate Commerce Act.

(e) "Unidentified payment" means a payment which a carrier has received for the performance of transportation services but which the carrier is unable to match with its open accounts receivable or otherwise identify as being due.

(f) "Claimant" means any shipper or receiver, or its authorized agent, filing a request with a carrier for the refund of an overcharge, duplicate payment, or overcollection.

PROCESSING OF CLAIMS

As proposed in section 1008.3, the carrier that collected the transportation charges is assigned the responsibility for processing the claim. As a practical matter, assignment of the primary responsibility of claims processing to the collecting carrier is favored by most carriers as the most expeditious and efficient manner of handling a claim and is the procedure presently utilized by most carriers. In most situations the collecting carrier would have information readily available for the disposition of the claim. This is particularly true with claims involving classification matters.

Of major concern to most shippers is the need for protection against the insolvency or bankruptcy of the collecting carrier. Various modifications of the proposed rules have been recommended. SNFCC proposes an amendment which would permit a claim to be filed with, or transferred to, any carrier that participated in a movement in the event that the collecting carrier is: (1) no longer in business; (2) the subject of a bankruptcy or reorganization proceeding before any court; or (3) unable to process the claim for any other reason.

ATA agrees that the filing of a claim with a connecting carrier[7] is bankrupt, but it proposes that the liability of the connecting carrier be limited to its pro-rata share of the overpayment received by that carrier.

Some of the shipper interests argue that the proposed assignment of full responsibility for the processing of a claim to the collecting carrier is unnecessarily restrictive in light of this Commission's recent findings in ***Denenholz & Janer, Inc., Petition for Declaratory Order,*** 355 I.C.C. 244 (1977). There, division 2 concluded that a carrier's inability to handle an overcharge claim establishes a right to transfer the handling of the overcharge claim to any connecting carrier in the movement. The Commission has consistently held under these circumstances that rail carriers are jointly and severally liable as joint tortfeasors which have exacted unlawful charges. Moreover, the U.S. Supreme Court explained in ***Louisville & N.R. Co.*** v. ***Sloss-Sheffield S. & I. Co.,*** 269 U.S. 217, 232 (1925):

> The cause of action sued on is of statutory origin. It rests primarily upon section 8 (Comp. St. §8572) which declares that if "any common carrier *** shall do, cause to be done, any act, matter, or thing in this act prohibited or declared to be unlawful *** such common carrier shall be liable *** for the full amount of damages sustained in consequence of any such violation of the provisions of this act, ***" The Commission held early, and has consistently held since, that carriers who by means of joint through rates make excessive charges are liable jointly and severally for all damages sustained.

The decision in ***Denenholz*** was primarily directed toward applicability to railroads, and because there is no provision in part II of the act that is comparable to section 8 in part I, it only

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In Ex Parte No. MC-42 (Sub-No. 1), Handling of C.O.D. Shipments, served July 9, 1978, the Commission instituted a proceeding based upon a number of complaints from the shipping public concerning c.o.d. funds unpaid as the result of motor common carrier bankruptcies, and regarding the failure of carriers to forward c.o.d. remitances in a timely manner.

incidentally referred to motor carriers. However, it was observed that the carriers' own rules provided in The ATA's Motor Carrier Freight Claim Rule Book, in general, imply a recognition of the joint and several liability for overcharge claims by all the carriers involved in the movement. Rule 129 therein, in particular, provides for the solvent carriers to apportion an insolvent carrier's share of the claim.

To assure prompt and expeditious processing and disposition of claims, we conclude that the primary responsibility will remain with the collecting carrier. However, proposed section 1008.3 will be modified to provide that if the collecting carrier is unable to dispose of a claim for any reason, the claim may be filed with or transferred to any participating carrier for final disposition.

When a claim is filed with a carrier other than the collecting carrier, the proposed regulations require that carrier to transmit the claim to the collecting carrier within 15 days after receipt and to "so notify the claimant." There is merit to the suggestion that notification to the claimant of this transmission is unnecessary and duplicative, since the collecting carrier must acknowledge the claim within 30 days of its receipt in accordance with the provisions in section 1008.7. Elimination of the notification of transmission would not adversely affect a claimant and will, therefore, be deleted.

Suggestions that the 15-day transmission period be extended to 30 days are not justified. A 15-day period is ample time for a carrier to make a simple determination as to whether or not it has collected the freight charges. Therefore, the 15-day transmittal period will be retained as proposed.

Several carriers state that the requirement that claims be filed in writing is too restrictive and does not allow for the use of telephonic communications. In the interest of eliminating unnecessary paperwork, it is suggested that a carrier be permitted to waive the requirement that claims be filed in writing.

We believe that use of a telephone or any other modern means of communication which would expedite claims processing is acceptable. However, a written claim is necessary, prior to payment, to provide proper documentation necessary to avoid unsupported rebates to selected shippers. Section 1008.3(a) shall be modified to provide that a claim shall not be *paid* unless filed in writing. This modification would not preclude shippers and carriers wishing to expedite claims processing from telephoning pertinent information to initiate the processing procedure prior to the actual submission of the written claim.

As proposed, section 1008.3(b) requires submission of separate claims for each shipment except where an overcharge resulted from "the same circumstances."

Several freight auditing bureaus oppose any rule that would deny use of a consolidated form of claims submission and argue that consolidation benefits both shippers and carriers.

The obvious advantage of claims consolidation is in minimizing the volume of paperwork and checkwriting involved in filing and processing claims. However, a significant processing problem is created when a carrier is presented with a single claim involving numerous, unrelated shipments which it must process within a limited time (see section 1008.8). This also applies to the suggestion that consolidation be left entirely to shippers' discretion.[8]

The proposed rule recognizes the need for appropriate or related groupings of shipments in a single claim, but the phrase "in the same circumstances" needs clarification to provide sufficient guidanee as to what types of groupings would be appropriate.

Section 1008.3(b) will be modified as follows:

> (b) A single claim may include more than one shipment provided the claim on each shipments involves:
>
> (1) the same tariff issue or authority or circumstances; or
> (2) single line service by the same carrier; or
> (3) service by the same interline carriers.

Several carriers request that a specified minimum amount be required for the filing of overcharge claims. They assert that the Commission, in instituting any rule, must consider the cost/benefit relationship of the proposed rule to the relief intended by that rule. As one respondent indicates, carriers may find it more economical simply to pay an insignificant "de minimus" claim rather than bear the expense of processing it. A required minimum amount of $10 is proposed for the filing of an overcharge claim.

Similarly, Freight Forwarders Institute proposes that carriers should be obligated to refund only amounts in excess of $25 on overpayments discovered by the carrier and unsupported by a claim.

The establishment of a required minimum amount for the filing of a claim is clearly improper. Although we are cognizant of the costs involved in processing a claim, section 217(b) of the act makes it unlawful for a carrier to charge or collect any amounts greater or lesser than those specified in its duly published tariff. Therefore, when a claim is filed, a carrier has a duty to pay or decline the claim on its merits, regardless of the amount involved.

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[8] Garrett Freight Lines takes the position that consolidation of claims should be left to the discretion of the shipper because, as a practical matter, a shipper would not consolidate numerous claims involving many different interline and complicated tariff situations.

Nor can there be any difference in the situation where a carrier discovers an overpayment and no claim has been filed, since its obligations under section 217(b) to strictly observe the published tariff charges would be the same as when a claim had been filed. We note, as pointed out by the BIE, that while the law makes no specific exception, it probably did not intend that refunding would be required where overcharges are discovered by a carrier for which no claims have been filed and in amounts so insignificant that they have been absorbed in bookkeeping and handling costs. This would amount to a vain and ineffective act not contemplated under the law. However the same would not be true where recurring overcharges are discovered on a series of shipments, the aggregate being substantial.

DOCUMENTATION OF CLAIMS

Many parties have emphasized that in the interest of efficient and timely processing of claims, documentation should be kept to a minimum. They stress that the purpose of any rule for documentation is to enable the carrier to identify the shipment and to ascertain the basis for the claim. There have been many comments as to what documents should be required and concerning what should happen if a claimant fails to submit a required document. It is pointed out by some shippers and carriers that the phrase "at a minimum," preceding the list of 13 specified items required in proposed section 1008.4(a), would allow for denial or delay in payment of a valid claim upon a claimant's noncompliance with any one of the so-called "13 mandatory documentation requirements." Garrett Freightlines, Inc. (Garrett), suggests that if rigid, precise documentation is required, it is conceivable that valid claims will be declined or not processed because of a technical failure to comply with the "letter of the law," or as expressed by McLean Trucking Company, "13 additional avenues of declination have been opened to unscrupulous carriers contrary to the intent of the contemplated rules."

It is also suggested that rigidly enforced documentation requirements could work an extreme hardsnip on some claimants, particularly small business people who might not be aware of the rules. In particular, item VIII, requiring claimants to include the bill of lading number and date,[9] was strongly objected to by many parties, since carriers often do not include bill of lading information on their freight bills. Furthermore, a claimant who, for example, is the consignee of a collect shipment, may not have access to certain documents. It is also asserted that the bill of lading number and date would have no effect upon freight rate application, and, therefore, requiring its inclusion in a claim would be unnecessary and useless.

Several parties assert that the freight bill contains most of the information required in the 13 specified items and that requiring this information in addition to the freight bill is therefore unnecessary, superfluous and time consuming. To illustrate, National Motor Freight Traffic Association (NMFTA) lists the following 18 to 21 types of information included in freight bills: (1) date of shipment; (2) carrier's progressive number (Invoice Number); (3) shipper's name and address; (4) consignee's name and address; (5) interline carrier identification and location; (6) interline carrier's pro number[10] and date of bill; (7) number of articles shipped; (8) description of commoditiy shipped; (9) weight of each piece or group of pieces being shipped; (10) tariff rate and extension of total charges, including accessorial charges, applicable at origin and/or destination; (11) notation as to whether the shipment is prepaid or collect, including other special arrangements such as c.o.d., order notify, et cetera; (12) trailer number; (13) routing of shipment; (14) any special delivery or billing instructions, including billing to parties other than shipper or receiver; (15) identification to carrier's accounts receivable; (16) identification to interline accounts payable; (17) carrier's net revenue; (18) special commodity codes required by ICC for shipments over 10,000 pounds; (19) biller's special code for quality control; (20) rate clerk's special code for quality control; and (21) special instructions for billing such as extra copies of statements, freight bills, et cetera, including charges therefor.

Various suggestions were made urging the Commission to provide a less restrictive rule and to require only the information necessary to substantiate the claim, i.e., only those documents that are necessary and pertinent. On the other hand, several parties believe that elimination of the list of required documents would lead to endless disagreement between claimants and carriers as to which documents are "necessary and pertinent."

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[9] Reynolds Metals Company suggests that since carriers are duty bound to issue bills of lading, and utilize them for the preparation of freight bills, a more practical solution might be to require the bill of lading number and date be included on all freight bills.

[10] Most carriers maintain open accounts receivable by freight bill progressive number, "pro number," rather than by the name of the debtor.

We are persuaded that a less restrictive documentation requirement is appropriate. Section 1008.4(a) has been revised to provide a more flexible and realistic documentation rule. Requirement of repetitive information, of items that are not accessible to a claimant, or of information that is actually not necessary for the carrier's efficient processing of the claim, has been eliminated.

The requirement in proposed section 1008.4(b) that a claimant substantiate an overcharge claim by submitting an original *paid* freight bill or, where an original is unavailable, a certified copy of the paid freight bill and an indemnity agreement (as provided in proposed section 1008.9), has received considerable criticism. As various parties point out, it is no longer a common practice for carriers to furnish receipted freight bills. Therefore such a requirement would be impractical and unreasonable, and accordingly the word "paid" has been deleted.

It is also suggested that we eliminate the requirement that a copy of a freight bill be certified when an original is unavailable. We agree. The provision for an indemnity agreement provides sufficient protection for a carrier and obviates the need for certification. The rule will be revised accordingly.

ATA recommends that a copy of the means of payment (i.e., certified check, money order, et cetera) should accompnay claims for duplicate payment instead of *paid* freight bills. It asserts that copies of the means of payment will assist the carriers in researching their records as well as establish that the freight bill had, in fact, been paid. However, in many instances a canceled check would be nonexistent because of the widespread use of electronic interchange of funds. We also note that a requirement to produce copies of canceled checks or money orders would be a particular burden to the smaller or unsophisticated shipper. In any event, a carrier before paying a claim would check its own records to verify payment, and as long as the claimant furnishes sufficient information to assist the carrier in verifying the overpayment, the claimant should not be burdened with obtaining copies of the means of payment.

Naturally, any information or documentation that a claimant provides would be helpful and should be provided. However, a mandatory requirement that such documentation be provided is not necessary even though it may be helpful in processing the claim. In the interest of simplicity and flexibility we will require only that a claimant furnish freight payment information in support of its claim, rather than copies of the means of payment.

To summarize, an original freight bill (or copy of a freight bill with an indemnity agreement) together with a clear explanation of why or how the overcharge occurred is sufficient information to process an overcharge claim, in most instances. Although standard claim forms are available and in common usage, there is no particular advantage to the use of these forms. Their use would often result in the information that is already included on the freight bill. A simple letter or an abbreviated claim form of the shipper's own devising will serve as well and will require much less effort.

SNFCC recommends that section 1008.4(d) be amended to add a provision that carriers may waive the filing of claims for duplicate payment. In recognition of the fact that several carriers presently follow a procedure of immediate refund of any duplicate payments detected and verified, SNFCC suggests such a provision would allow for a more expeditious and economical disposition of duplicate payments.

Section 1008.10 of the proposed regulations requires carriers to refund promptly to the payor, overcharges, duplicate payments, and overcollections which it discovers through routine auditing or otherwise, and for which no claim has been filed. Therefore, an additional provision to permit carriers to waive the filing of claims for duplicate payment is unnecessary and would serve no useful purpose.

We observe that carriers will on occasion disallow claims simply because a document alleged to be necessary for the disposition of the claim is not provided by the claimant. This is improper because a carrier needing additional information should request it in accordance with the provisions of section 1008.5(c), *infra*.

In many instances the disallowance is merely a dilatory tactic to postpone final disposition of a claim. Since a disallowance letter starts the running of the statute of limitations,[11] additional protection should be afforded the shipping public. We have added a final paragraph (d) to section 1008.4, as suggested by SNFCC. It will provide as follows:

> (d) Regardless of the provisions of paragraphs (a), (b) and (c) of this section, the failure to provide sufficient information and documentation to allow a carrier to

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[11] Sections 204a(2) and 406a(2) of the act provide that if a claim for overcharge has been presented in writing to the carrier within the 3-year period of limitation said period shall be extended to include 6 months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

conduct an investigation and pay or decline the claim within the allowable time limitation shall not constitute grounds for disallowance of the claim, and carriers shall comply with the provision of section 1008.6(b) to obtain the additional information required.

ACKNOWLEDGMENT OF CLAIMS

As proposed, section 1008.5 requires: (a) carriers to acknowledge receipt of a claim in writing to the claimant within 30 days, unless the carrier has paid or declined the claim within that period; and (b) that a carrier's request for additional information must be in writing and made within 15 days of receipt of the claim.

We find little merit in the suggestion of several carriers that written acknowledgment be eliminated because it delays the processing of the claim. As indicated in the NPRO, a major source of shipper complaint that led to the initiation of this rulemaking is the failure of carriers to acknowledge claims. The purpose of an acknowledgment, to advise a claimant that the carrier has received its claim and to provide claimant with the carrier's claim number, can be acommplished by a simple form letter or postcard. It must be noted, however, that the rule requires that any written inquiry that purports to be a claim must be acknowledged within 30 days; the only justification for not acknowledging a claim would be its payment or declination within 30 days. Paragraph (a) of section 1008.5 will be retained as proposed.

Most carriers view the 15-day period for requests for additional information, as provided in paragraph (b) of the proposed rule as an unrealistic time frame which is unduly burdensome to the carrier and inconsistent with paragraph (a) allowing 30 days for acknowledgment.

Upon reflection, we believe that the proposed 15-day requirement for requesting additional information, in writing, is unnecessarily restrictive and should be eliminated. A request for additional information could be included with the written acknowledgment. This would not only provide additional time for a carrier to research its records, but also it would eliminate the expense of contacting the claimant twice. Essentially, the same procedure is provided in the rule for acknowledgment of loss and damage claims. (See 49 CFR 1005.3).

Moreover, elimination of the requirement that a request for additional information be in writing would allow a carrier to utilize the telephone or other expeditious means of communication to obtain any desired information. In view of the 60-day time frame provided for disposition of claims (see our discussion at sheet 29, *infra*), the above requirement is needlessly rigid and does not allow the carriers sufficient latitude to function effectively. Accordingly, paragraph (b) will be deleted, and the adopted regulation on Acknowledgment of Claims has been designated section 1008.7.

A more flexible rule has been added to section 1008.5, Investigation of Claims, providing:

> (c) In the event the carrier processing the claim requires information or documents in addition to that submitted with the claim, the carrier shall promptly notify the claimant and request the information required. This includes notifying the claimant that a written claim must be filed before the carrier becomes subject to the time limits for settling such claim under section 1008.8.

INVESTIGATION OF CLAIMS

Proposed section 1008.6 provides that upon receipt of a claim, the processing carrier shall promptly initiate an investigation and establish a file; or if a claim has not been filed and a carrier discovers an overcharge, duplicate payment or overcollection, the carrier shall promptly initiate an investigation and establish a file as though a claim had been filed.

Numerous carriers object to the requirement that a claim file be established for an overpayment discovered by a carrier, and not supported by a claim. They contend there is no need to establish a file when a carrier makes a prompt refund, and they are concerned about the additional and allegedly unnecessary volume of paperwork involved. Several shippers support the carriers' position. They suggest that carriers discovering an overpayment should be required to notify the involved shipper for verification, and only after receipt of a verification, should the carrier be required to initiate a file.

Although we are aware of the administrative and cost burdens involved in the proper maintenance of claim files, good business practices dictate the need for careful, accurate recordkeeping whenever any refund is made in order that the carrier shall have knowledge of the extent of overpayments and duplicate payments received. Moreover, we believe that the files are necessary for efficient supervision of carrier practices by this Commission and they will be of substantial benefit in our enforcement of the prescribed regulations.

DISPOSITION OF CLAIMS

Various alternative time periods for disposition of claims have been proposed by the parties. Shippers suggest a limitation of 30 or

45 days while carriers propose a period of 90 or 120 days. It also has been suggested that the proposed 60-day time limit for all types of claims is unwise and that claims for duplicate payment or overcollection should be placed in a separate category with a 30-day period for their disposition.

The time required to process a claim, whether for an overcharge, duplicate payment, or overcollection, varies and depends on many factors including the age of shipment, the complexity of the issues, and the extent of documentation provided.

In our view 60 days provides a realistic and workable period for the disposition of claims. It is reasonable both to the shipper and the carrier, and would lessen the incidence of summary declinations by carriers by providing adequate time for carriers to complete their investigation and disposition procedure.

Several parties object to the proposed provision for additional 30-day extension periods when a carrier is unable to process and dispose of a claim within 60 days. They argue that the provision for a "final day" or specific deadline for the final disposition of claims is essential and vital to the shipping public. As the parties suggest, such an open-ended provision, conditioned only upon the carrier's issuance of 30-day status reports to the claimant, would facilitate dilatory tactics where the intent of a carriers is to procrastinate.[12]

REFUNDS INITIATED BY CARRIERS

We agree that insufficient protection is afforded the shipping public when a carrier is permitted an unlimited number of 30-day extensions simply by writing the claimant each month explaining the delay. Accordingly, proposed section 1008.7 has been modified to provide that all claims must be paid, declined or otherwise settled within 60 days, except where the claimant and the carrier agree, because of extenuating circumstances, to a limited extension. It has been designated as section 1008.8 of the adopted regulations.

CLAIM RECORDS

As originally proposed section 1008.8 requires carriers to (a) maintain a claims register and (b) at the time a claim is received create a separate file and assign it a successive claim file number.

ATA among others suggests that the words "register" or "file" be eliminated in favor of the word "record" to avoid undue restraints on efficiency and economy. It is asserted that less restrictive recordkeeping requirement would permit a carrier to continue to maintain a manual recordkeeping system; or it would afford the carrier either the opportunity to establish, or continue to maintain, a computer-based claim register and record system which is quick, accurate, and economical.

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[12] SNFCC notes that the same type of open-ended time frames have created problems in the disposition of loss and damage claims.

A separate claim file containing all pertinent information is necessary for efficient, timely processing of a claim. The fact that a carrier maintains a computer based or manual record system would not eliminate the need for providing a separate file containing all the supporting documents related to a claim. Maintenance of separate files in sequential order is similarly required for loss and damage claims, and the maintenance of such files for claims would meet the investigative needs of the Commission while not unreasonably burdening the carrier. Accordingly, provision for separate claim files in sequential order will be required.

Although it is apparent that many carriers presently utilize claim registers as part of their recordkeeping function, numerous carriers object to a mandatory claim register requirement. They point out that such a requirement provides an unnecessary and duplicate layer of recordkeeping and administrative expense over and above a carrier's ordinary computer records and individual claim files and moreover, would serve no valid function.

The BIE strongly supports a claim register requirement for the purpose of facilitating the investigative work of this Commission because it would be helpful in the supervision of carrier practices and it would serve both as an audit control and a carrier control, available for efficient and expeditious review.

A major objective of any recordkeeping system is to provide information readily and economically. Although we favor the maintenance of a register as an effective internal control device, as with loss and damage claims, we do not believe a mandatory register requirement is warranted. We have required separate files containing all pertinent information to be kept in numerical sequence. Any benefit to the Commission by requiring a register in addition to the files would not be justified when compared to the added work for the carriers, particularly the smaller carriers using manual accounting systems. Moreover, any audit or investigative work would ultimately require a review of file documentation which would be conveniently located in numerical sequence under these rules. Accordingly, the proposed requirement for a claims register has been deleted, and the adopted regulation has been designated as section 1008.6.

INDEMNITY AGREEMENTS

When a claimant cannot furnish original documents as required by section 1008.4 and instead furnishes copies, section 1008.9, as proposed, provides that the claimant shall enter into an agreement indemnifying the carrier for subsequent claims which may be filed and supported by the original documents.

Indemnity agreements, although varying in style, format, and length, have been in common use for many years. Only one carrier opposed the provision allowing for indemnity agreements, insisting instead upon the submission of paid freight bills. As stated earlier, freight bills are rarely receipted in present carrier operations and the requirement for their presentation would, therefore, be unreasonable.

One carrier suggests that a simple, concise, and uniform indemnity statement, as indicated in the following examples, should be adopted:

> The carrier is indemnified by the claimant against any and all loss or expense resulting from payment of the claim due to non-surrender of the original documents.
>
> or
>
> *** hereby agrees to protect the carrier with whom this claim is filed by reason of settlement without surrender of the original paid freight bill and we unequivocably guarantee reimbursement.

Although the prescription of a specified indemnity agreement has the advantages of consistency and uniformity, it is also rigid and unnecessary.[13] Regulations should be as clear and as brief as possible. Specifying the exact contents of such an agreement in the rules would create an inflexibility in an area where the intention clearly and concisely stated is more important. The following indemnification provision will be included as paragraph (e) of section 1008.4 of the adopted regulations:

> (e) A carrier may accept copies instead of the original documents required to be submitted in this section where the carrier is furnished with an agreement entered into

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[13] The suggestion by William & Associates, Inc., that the rule specifically indicate that an indemnity agreement may be included as part of the overcharge claim form, is unnecessary. The rule as provided does not prescribe a particular format, and the above suggestion would not be precluded.

by the claimant which indemnifies the carrier for subsequent duplicate claims which might be filed and supported by the original documents.

UNIDENTIFIED PAYMENTS, OVERCHARGES, DUPLICATE PAYMENTS, AND OVERCOLLECTIONS NOT SUPPORTED BY CLAIMS

It is apparent that the parties view proposed section 1008.10, providing for the disposition of overcharges, duplicate payments, and overcollections not supported by claims, as the most controversial and important regulation in this proceeding. The carriers almost uniformly object to this section, which they have characterized, albeit somewhat inaccurately, as the "automatic refund rule." It provides that a carrier is required, on its own initiative, to refund promptly to the payor overcharges, duplicate payments, and overcollections which it discovers through routine auditing or otherwise, and for which no claim has been filed. It further provides that where the discovery of the overpayment is made by a carrier party to the movement, but not the collecting carrier, that carrier must immediately notify the collecting carrier, in writing, of the overpayment.

While carriers generally agree that refunds should be made promptly, their opposition to the so-called automatic refund provision is based on their belief that its implementation will unduly burden the carriers; impose increased administrative responsibilities; provide additional expenses and accounting costs; and in effect, create more problems than it would solve.

ATA contends that the procedures proposed are oversimplified and do not meet the serious complications connected with the problem. To illustrate, it lists the following problems involved in any automatic refund:

(1) An unidentified payment may, in fact, be a payment of freight charges owing to the carrier;

(2) A difficulty often arises in determining to whom a refund is properly owed in instances of payments received both from the shipper and consignee;

(3) Many customers frequently realize their own payment errors and deduct these amounts from subsequent payments to the carrier;

(4) Examples 2 and 3 may create a carrier balance due situation or may place the carrier in a claimant position where the carrier had processed an automatic refund; and

(5) What often appears to be a duplicate payment actually can be an error in remittance information, particularly where a shipper generates many shipments carrying the same freight charges.

ATA points out that unlike other industries, the collection process in the motor carrier industry can be expected to result in a greater percentage of unidentified payments because of essentially two factors: (1) most carrier receivable accounting systems are not established on a customer basis but rather on a freight bill progression number or "pro number" basis; and (2) rates and charges are subject to interpretational differences on the part of customer and carrier.

Emphasizing that most duplicate payments are generated by shippers', consignees' or other parties' inadequate accounts payable procedures, ATA argues that it is not equitable to place the entire burden of this problem upon the carriers.

Instead of the proposed automatic refund, ATA supported by several shippers,[12] recommends that a claimant notification and verification procedure be provided which would require a carrier, unable to apply properly an unidenitified payment, to notify the payor within 60 days after the carrier becomes aware of the problem or within 120 days from the date of deposit of payor's remittance. If verification information requested is not received within 90 days from date of notification, the carrier will treat payment as in fact a payment of freight charges owing to it. Following the 90-day period the regular claims procedure must be followed.

ATA has urged the Commission to hold an informal conference wherein motor carrier financial, accounting and traffic executives could present the needs of the industry to require documentation of duplicate payment claims. In view of our revision of proposed section 1008.10, see page 141, *infra,* we see no need for an informal conference at this time.

Our concern with the expanding problem of duplicate payments and the need for fair and expeditious procedures for their disposition was reflected in Accounting Series Circular 156, issued September 29, 1975. In it the Commission's Bureau of Accounts observed that often inadequate effort is made to identify and refund duplicate payments and reminded the carriers of their obligation to refund duplicate payments whenever practicable. Carriers were also advised to have a plan for identifying and refunding duplicate payments.

Investigations conducted as a joint effort of the ICC's Midwestern Region's Bureaus of Accounts, Investigations and Enforcement, and Operations culminated in the Commission's instituting suits in

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[12] General Mills, Inc., National Small Shipments Traffic Conference, Inc., Drug and Toilet Preparation Traffic Conference support a notification and verification procedure.

Federal District Courts, charging 23 motor carriers with failure to refund duplicate payments totalling more than $4 1/2 million. Additional court suits have been filed in U.S. District Courts in New York and New Jersey charging four motor carriers and two freight forwarders with illegally retaining duplicate payments in various accounts designated as: "unmatched cash"; "unapplied revenue"; "unresolved items"; "unmatched credits"; and "deferred credit." To date 14 major trucking companies have been directed to make refunds of the duplicate payments and to implement plans to identify and refund such payments in the future. The successful conclusion of those 14 court actions should lead to refunds of approximately $2 million to shippers and consumers.[15]

The magnitude of the problem is illustrated by the BIE's observation in its initial statement:

> This Bureau has stated its belief that the practice uncovered by the Commission's investigations involving these 12 carriers are not isolated instances but could rather reflect only a miniscule portion of a very extensive and up to now only dimly perceived and barely revealed problems weighing upon this nation's shippers. If so, then their potential impact on raising transportation costs to the general public, while unjustly enriching a few or many unscrupulous operators could be most significant in terms of shippers whose capital is diminished and consumers who ultimately must pay high prices for merchandise.

Section 1008.10, as proposed, requires prompt disposition of all instances of overcharge, duplicate payment, and overcollection, when discovered by the carrier itself and not supported by a claim. We do not perceive the need for a notification and verification procedure where a payment can be identified through routine internal auditing or self-discovery by the carrier as a duplicate payment,[16] overcharge, or overcollection. In those instances, the carrier has an immediate obligation to make a refund to the payor, and a 30-day period from the date of discovery is more than ample time for a carrier to make that refund.

The carrier's obligation to make prompt refund of overpayments derives from various statutory provisions. Under the act, carriers have a duty to collect the tariff-published charge. Section 217(b)[17] of the act provides that no motor common carrier "shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time."

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[15] A joint motion for leave to file supplemental comments and several replies to that motion have been filed. We believe the evidence tendered concerning the decision in one of the court actions instituted by the Commission is properly admissible in this proceeding since the record already reflects the outcome in several other of those court actions. The motion, therefore, is granted.

[16] With regard to duplicate payments, Garrett states in its initial statement:

> The emphasis must be on the carrier actually having in its possession the duplicate payment. If it is identified and the rightful payor(s) is known, then it is incumbent that a voluntary payment be accomplished promptly.

Sections 216(b) and 404(a) of the act require carriers and forwarders to observe just and reasonable regulations and practices related to, or connected with the transportation of property. Unjust discrimination or undue or unreasonable prejudice or disadvantage is prohibited by section 216(d), and comparable provisions related to forwarders are found in section 404 of the act.

Whatever the reason for a carrier's or forwarder's retention of an overcharge, duplicate payment, or overcollection, the fact remains that there is statutory duty to receive no more than the tariff-published charges, and it naturally must follow that there is a concomitant duty to refund any excess amounts collected.

In discussing overcharges or inapplicable rates, the Commission, in *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M.C.C. 337, 343 (1944), stated:

> When we find that the rates charged by a carrier are inapplicable, it at once becomes the duty of the carrier to refund any overcharges and of the shipper to pay any undercharges, without an order or other action on our part and without resort to a court. It is to be noted that section 222 provides penalties for failure to observe the provisions of tariffs on file with us.

In concluding to omit duplicate payments from the term overcharge and the act's relevant 3-year statute of limitations, division 2, in *Duplicate Payment of Freight Charges, supra* at 520, emphasized the following:

> We believe our interpretation here is necessary. The carriers and their representatives are reminded that, had they acted to resolve duplicate payment claims promptly and with understanding of the reasons for which they occurred, instead of attempting to retain as a revenue source these monies paid in error and not paid for performance of transportation services, our action herein would not be necessary.

Concerning the problem of overcollections, the absence in the present household goods regulations of a specific requirement that carriers make prompt refund of overcollections and the many shipper complaints of unreasonable delay in obtaining those refunds led to the Commission's news release of November 14, 1974. There, the household goods carriers were reminded that the money involved is not dispute and belongs to the shipper. The Commission cautioned the carriers against continuance of delaying practices, strongly encouraged immediate institution of voluntary practices to prevent such complaints, and indicated it would consider appropriate regulations should the complaints persist.

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[17] Comparable provisions are found in part I, section 6(7); part III, section 306(c); and part IV, section 405(c).

It is evident that the proposed automatic refund rule does not impose upon carriers and forwarders any further responsibilities beyond those which they are presently, by statute, obligated to perform.

The relationship between the 7-day credit period and the incidence of duplicate payments was noted by several parties. They indicate that the present 7-day credit period does not provide sufficient time to permit the normal processing of freight bills by many shippers and receivers, especially those with multibranch organizations and centralized accounting systems. They maintain that allowing carriers several additional days to present freight bills would result in more accurate billing, and would eliminate many balance due freight bills and the resultant problems of shippers paying both the original bill and the follow-up billing.

Any change in the existing credit regulations is beyond the scope of this proceeding. The Commission's credit regulations are presently under consideration in the consolidated proceeding, Ex Parte No. 73, *Regulations for Payment of Rates and Charges*, Ex Parte No. MC-1, *Payment of Rates and Charges of Motor Carriers*. By order entered April 15, 1977, the consolidated proceeding was held open for 1 year for the purpose of investigating and compling data on the frequency and magnitude of violations of the existing credit regulations. The Commission is presently reviewing and evaluating the data gathered by the field staff. A decision on whether or not to amend the credit regulations will be announced by the Commission in the cited consolidated proceeding.

Several carriers maintain that the requirement of voluntary or automatic refund is impractical and incompatible with their accounting systems. They argue that in view of the prevalent shipper practice of offset or charge-back, a voluntary refund procedure can result in duplicate handling and a net underpayment experienced by the carrier.[18]

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[18] The practice of shippers offsetting or charging-back may be a violation of the act's requirement that shipper pay the charges on the specific service performed. The U.S. Government, formerly GAO (now apparently GSA) by Statute is authorized to offset payments to a carrier based upon a post audit of freight bills. See, section 322 (49 U.S.C. 66). In light of the comments raised by the carriers on this record, we will refer this matter to the staff for further exploration.

We agree with the position taken by the BIE, that this should not present a serious problem. The carriers may always rebill, in those instances where such a billing discrepancy does occur, and correction of such discrepancy can be accomplished readily under a bank payment plan or similar clearing plan.

The originally proposed automatic refund provision will be retained essentially as proposed, and will be designated as paragraph (b) of section 1008.9. It has been modified to provide additional flexibility to the noncollecting carrier in notifying the collecting carrier of possible overpayments, by eliminating the proposed requirement that such notification be "in writing." The revised provisions of section 1008.9 are set forth below.

The ATA's recommended notification and verification procedure is basically addressed to the problem of unidentified payments. Unidentified payments occur whenever a carrier receives a payment and is unable to apply it, i.e., match it with open accounts receivable. As noted earlier, identification problems are created by various circumstances and reflect the complexities involved in the billing and collecting process. It must be recognized, however, that a significant improvement in this complex area would be achieved if shippers would properly identify all payments made to carriers for transportation services. Similarly, the proper labeling of all rebilling statements by the carriers would also substantially reduce the incidence of error in this area.

Several carriers insist that, in effect, no overpayment can be identified "with certainty" without a prior verification from a potential claimant. We disagree. In many instances a carrier will have the necessary information and through its own internal investigation will be able to identify a payment. It is when a carrier's investigation does not reveal the identity of a payment that a notification and vertification procedure becomes necessary and appropriate.

Because of the variety in carrier billing and collecting systems, we believe an additional provision dealing with unidentified payments will provide sufficient latitude for carriers and forwarders to develop their own individual procedures. Accordingly, proposed section 1008.10, designated as section 1008.9 of our regulations, has been amended to include a new paragraph (a), and provides as follows:

§1008.9 Disposition of unidentified payments, overcharges, duplicate payments and overcollections not supported by claims.

(a) Carriers shall establish procedures for identifying and properly applying all unidentified payments. If a carrier does not have sufficient information with which properly to apply such a payment, the carrier shall notify the payor of the unidentified payment within 60 days of receipt of the payment and request information which will enable it to identify the payment. If the carrier does not receive the information requested within 90 days from the date of the notice, the carrier may treat the unidentified payment as a payment in fact of freight charges owing to it. Following the 90-day period, the regular claims procedure under this part shall be applicable.

(b) When a carrier which participate in a transportation movement, but did not collect the transportation charges, finds that an overpayment has been made, that carrier shall immediately notify the collecting carrier. When the collecting carrier discovers or is notified by such a participating carrier that an overcharge, duplicate payment, or overcollecting exists for any transportation charge which has not been the subject of a claim, the carrier shall create a file as if a claim had been submitted and shall record in the file the date it discovered or was notified of the overpayment. The carrier that collected the charges shall then refund the amount of the overpayment to the person who paid the transportation charges or to the person that made duplicate payment within 30 days from the date of such discovery or notification.

INTEREST

Virtually all shippers and the BIE strongly recommend that the proposed rules be amended to include mandatory payments of interest by the carriers on all overcharge, duplicate payment, and overcollection settlements. They assert that inclusion of penalties in the form of substantial interest payments on monies held by carriers is vital to the success of this rulemaking.

Essentially shippers argue that: (1) carriers, by their receipt and retention of funds in excess of the published charges, are in continuing violation of the act and that a mandatory interest requirement is necessary to compensate a claimant for the loss of the use of its money; and (2) since railroads voluntarily pay interest on overcharge claims, a fundamental discrimination exists between the different transportation modes which should be eliminated.

The proposals are varied as to the rate of interest and the point at which it would begin to accrue. For example, some parties propose that interest accrue from the date the claim is filed, others suggest it run from the date of delivery of the shipment. The level of rates of interest suggested vary from 4 to 8 percent per annum to 1 1/2 or 2 percent per month, or take the form of a fixed dollar amount per claim, applicable for each day settlement is delayed beyond a specified period.

The BIE urges the imposition of an interest charge of 1 1/2 percent per month on all amounts of overcharge, duplicate payment, or overcollection outstanding after the passing of the initial specified time periods, computed from the date of delivery of the shipment. It argues that the Commission has the authority to prescribe a particular rate of interest for the future and that imposition of interest charges will reduce the delay encountered by the public in obtaining refunds. It also notes that the Commission, in *Loss and Damages, supra,* recognized the importance of the assessment of interest as a means to regulate the quality and level of compliance by carriers in payment of legitimate claims.

Shippers favor an interest requirement not only to compensate a claimant for loss of the use of its capital but to serve as an incentive to carriers both to correct and reduce errors. To eliminate the possibility of discrimination, it is suggested that the rate of interest be set by the Commission and not left to negotiations between shippers and carriers.

The carriers adamantly oppose any interest requirement, which they characterize as inequitable and ill advised. They emphasize the many administrative complexities involved, and the grave financial impact on marginal carriers and note that the cost of calculating the interest charges often would be greater than the amount paid. Relying on *Fedders-Quigan Corp.* v. *Long Transp. Co.*, 64 M.C.C. 581, 587 (1955), ATA questions the authority of this Commission to award or set the rate of interest in any case arising under part II of the act.

The proposed regulations as revised and adopted require written acknowledgment of all claims, a strict time limitation for their disposition, and a flexible documentation rule. These regulations should substantially improve carrier practices and alleviate the vast majority of complaints regarding recovery of overpayments by shippers. The time lag between overpayment and refund will be substantially reduced by carriers' adhering to these regulations. As a carrier will not benefit from overpayment since such overpayment must be promptly refunded, sufficient justification for the imposition of mandatory interest charges has not been established.

Furthermore, the evidence of record does not support the establishment of any particular level of interest, nor are we persuaded that the requirement of interest would result in any greater compliance with the rules. Accordingly, we conclude that a mandatory interest requirement shall not be imposed at this time. However, should the Commission's monitoring of the carriers' compliance with these regulations indicate the need for an interest requirement, this matter will be reopened for further consideration.

FINDINGS AND CONCLUSIONS

The regulations as adopted reflect our consideration of all the evidence of record and the comments and replies received in response to the NPRO. Our goal is, and always has been, to achieve impartial, sound, and realistic regulations consistent with the national transportation policy as declared by Congress.

The adopted regulations provide sufficient guidance to the carriers in processing overpayments, while allowing necessary flexibility in implementing individual programs. We believe they are necessary to foster prompt and equitable handling of all claims for overpayment.

We find:

(1) The Commission has the requisite authority and affirmative duty to prescribe the regulations as set forth in the attached notice.

(2) The regulations as adopted are necessary and warranted and shall be prescribed as Part 1008 of Title 49 of the Code of Federal Regulations.

(3) The regulations as adopted do not significantly affect the quality of the human environment.

It is ordered:

(1) The attached notice is incorporated by reference into this decision.

(2) Chapter X of Title 49 of the Code of Federal Regulations is amended by adding a new Part 1008 as set forth in the attached notice.

(3) In accordance with the provisions of sections 217(a) and 405 of the act, carriers are required to file, within 45 days of publication of the attached notice in the Federal Register, all rules and practices pertaining to the processing and disposition of claims for overpayment in their tariffs.

APPENDIX A

Proposed rules

Part 1008—PROCEDURES GOVERNING THE PROCESSING, INVESTIGATION AND DISPOSITION OF OVERCHARGE, DUPLICATE PAYMENT, OR OVERCOLLECTION CLAIMS

Sec.
1008.1 Applicability of regulations
1008.2 Definition of terms
1008.3 Processing of claims
1008.4 Documentation of claims
1008.5 Acknowledgment of claims
1008.6 Investigation of claims
1008.7 Disposition of claims
1008.8 Maintenance of claim register and files
1008.9 Indemnity agreement
1008.10 Disposition of overcharges, duplicate payments, or overcollections without claim

§1008.1 Applicability of regulations

The regulations set forth in this part shall govern the processing, investigation and disposition of claims for overcharge, duplicate payment for the transportation of property, or overcollection for the transportation of household goods, in interstate or foreign commerce, by motor carrier and freight forwarder (hereinafter called carrier), subject to parts II and IV of the Interstate Commerce Act.

§1008.2 Definition of terms

(a) Overchange. The term "overcharge" refers to overcharges as defined in sections 204a(6) and 406a(6) of the Interstate Commerce Act. The term "overcharge" does not encompass nondisputed duplicate payments as defined in paragraph (b) or nondisputed overcollections as defined in paragraph (c) of this section.

(b) Duplicate payment. The term "duplicate payment" refers to two or more payments, made in the exact amount of the published freight charges, for transporting the same shipment, where there is no dispute regarding the applicability of such charges, or the quality or quantity of the service performed. Duplicate payments are not "overcharges" or "overcollections" as defined in paragraphs (a) or (c) of this section.

(c) Overcollection. The term "overcollection" refers to receipt by a household goods carrier of a payment(s) in excess of transportation and/or accessorial charges applicable to a particular shipment(s) of household goods, as defined in part 1056 of this chapter, under tariffs lawfully on file with the Commission, when there exists no dispute regarding the applicability of the charges. Where a dispute does exist between the parties, the collection of excess amounts shall be considered and treated as an "overcharge" as defined in paragraph (a) of this section.

§1008.3 Processing of claims

(a) A claim for overcharge, duplicate payment, or overcollection shall not be processed unless filed in writing, as provided in section 1008.4, within the applicable time limits. The carrier that collected the transportation charges shall be responsible for the handling of a claim. If a claim is filed with a carrier other than the carrier that collected the transportation charges, such carrier shall transmit the claim to the carrier that collected the transportation charges within 15 days after receipt thereof and so notify the claimant. The carrier with which the claim was initially filed shall enter the claim in its claims register as provided in section 1008.5. The carrier that collected the transportation charges shall acknowledge the claim within the time limit named in section 1008.5.

(b) Claims presented in accordance with the provisions of this section should be accompanied by information sufficient to allow the carriers to conduct an investigation, and pay or decline, the claim within the time limitation set forth in section 1008.7. A separate claim shall be submitted for each shipment, except that more than one shipment may be included in one claim, if the overcharge resulted from the same circumstances.

§1008.4 Documentation of claims

(a) Each claim for the recovery of overcharges shall provide, as a minimum, the following information:

(1) the name of the claimant;
(2) the file number assigned by claimant to its claim;
(3) the date the claim was submitted to the carrier;
(4) the article shipped and its weight, volume or measurement;
(5) the date of shipment;
(6) the names of the consignor and consignee;
(7) the origin, destination, and route of the shipment;
(8) the bill of lading number and date;
(9) the carrier's freight bill (Pro) number(s);
(10) the rate, classification or commodity description, and/or weight upon which charges were paid;
(11) the rate, classification or commodity description, and/or weight claimed to have been applicable;
(12) complete tariff authority for the rate, classification or commodity description claimed; and
(13) the amount of the overcharge sought to be recovered.

(b) All overcharge claims shall be accompanied, except as otherwise provided herein, by the original paid freight bill at the time the claim is presented to the carrier. If the claimant is unable to produce the original paid freight bill, a certified copy shall be considered proof of payment of the freight charges and entitlement to any overcharges. If claimant submits a certified copy of the paid freight bill, an indemnity agreement as set forth in section 1008.9 shall also be excuted and presented with the claim.

(c) Other transportation papers or documents should be submitted with the overcharge claim at the time it is presented to the carrier, if information provided by them is necessary to the carrier's investigation and disposition of the claim. These additional documents may include:

(1) The original bill of lading or a certified copy;
(2) The original invoice or a certified copy;

(3) The weight certificate or a certified copy;

(4) Sales brochures, advertising matter or excerpts from catalogues; and

(5) Any other documents, paper, or information which is believed by the claimant to substantiate the basis for its claim.

(d) Claims for duplicate payment of transportation charges and overcollection of charges on movement of household goods need only be accompanied by paid freight bill(s), and, in the case of overcollection, certified copy of means of payment, for example, certified check, money order, et cetera.

§1008.5 Acknowledgment of claims

(a) Each carrier shall, upon recipt in writing of a proper claim in the form described in these regulations, acknowledge the receipt of the claim in writing to the claimant, within thirty (30) days after the date of receipt.

(b) In the event the carrier investigating the claim requires information in addition to that provided by section 1008.4, the request for additional information must be in writing and must be transmitted to the claimant not later than fifteen (15) days from the date of receipt of the claim.

§1008.6 Investigation of claims

Upon receipt of a claim, the carrier that collected the transportation charges shall promptly initiate an investigation and establish a file, as required by section 1008.8, or if a claim has not been filed, and an overcharge, duplicate payment, or overcollection is discovered by the carrier, the latter shall promptly initiate an investigation and establish a file as though a claim had been filed. See section 1008.10.

§1008.7 Disposition of claims

Each carrier which collected the transportation charges, and which receives a written claim, shall pay, decline, or otherwise make settlement of the claim as its investigation may warrant, in writing to the claimant, within 60 days after receipt of the claim by the carrier; provided, however, that, if the claim cannot be processed and disposed of within 60 days, the carrier shall at that time and at the expiration of each succeeding 30-day period the claim remains pending, advise the claimant in writing of the current status of the claim and the reason for the delay in making a final disposition. The carrier shall keep a copy of this advice to the claimant in its claim file. If the carrier declines payment of the claim, or otherwise makes settlement in an amount different from that sought, the carrier shall notify the claimant, in writing, the reason(s) for its action citing tariff authority or other pertinent information developed as a result of its investigation.

If the claim was initially filed with a carrier other than the carrier collecting the transportation charges, the carrier processing the claim shall notify the first carrier of its disposition of the claim so that carrier may complete the entry in its claim register. See section 1008.8.

§1008.8 Maintenance of claim register and file

(a) Each carrier shall maintain a claims register which shall contain the following information:

(1) claim number assigned by the carrier (see paragraph (b) of this section);

(2) name of claimant;

(3) date of shipment;
(4) date claim received;
(5) date of acknowledgment;
(6) date of request, if any, for additional information;
(7) disposition of claim (declined, paid or paid in part); and
(8) date of disposition.

(b) Each carrier shall at the time a claim is received create a separate file and assign it a successive claim file number and note that number on all documents filed in support of the claim and all records and correspondence with respect to the claim, including written acknowledgment of receipt and, if in its possession, the shipping orders and delivery receipt, if any, covering the shipment involved. At the time a claim is received the carrier shall record the date of receipt on the face of the claim document, and the date of receipt shall also appear in the carriers' written acknowledgment of receipt to claimant.

§1008.9 Indemnity Agreement

When claimant cannot furnish original documents, as required by section 1008.4, and, instead furnishes certified copies of such documents, the claimant shall enter into an agreement indemnifying the carrier for subsequent duplicate claims which may be filed and supported by the original documents.

§1008.10 Disposition of overcharges, duplicate payment, or overcollection not supported by claims

If any carrier discovers, through routine auditing or otherwise, that an overcharge, duplicate payment, or overcollection exists for any paid transportation charge, which has not been supported by a claim, that overcharge, duplicate payment, or overcollection must be entered in the claims register as if a claim had been filed. When a carrier which was party to the movement, but did not collect the transportation charges, discovers that an overcharge, duplicate payment, or overcollection claim has been made, that carrier shall enter the overcharge, duplicate payment, or overcollection in its claims register and immediately notify in writing the carrier obligated under this section to investigate the matter. In the case of such overcharge, duplicate payment, or overcollection, the carrier which collected the charges must make a prompt refund to that person who paid the transportation charges, or the person that made duplicate payment, but in no event may the carrier retain such overcharge, duplicate payment, or overcollection for a period beyond thirty (30) days from the date of discovery.

APPENDIX B

Parties filing opening statements

Admiral Merchants Motor Freight, Inc.
Advance-United Expressways, Inc.
Aerospace Industries Association of America, Inc.
Alamo Express Incorporated
Alleghany Corporation
American Bureau of Transportation Services

Parties filing opening statements—Continued

American Association of Nurseymen
  Bicycle Manufacturers of America
  Hobby Industry Association of America
  Juvenile Products Manufacturers Association
  National Association of Bedding Manufacturers
  National Association of Furniture Manufacturers
  National Ceramic Manufacturers Association
  National Furniture Traffic Conference, Inc.
  National Home Furnishings Association
  National Office Products Association
  National School Supply & Equipment Association
  National Wholesale Furniture Association
  Toy Manufacturers of America
American Movers Conference[1]
American Textile Manufacturers Institute, Inc.
  North Carolina Textile Manufacturers Association, Inc.
  South Carolina Textile Manufacturers Association, Inc.
American Trucking Associations, Inc.[1]
Ashland Oil, Inc.
Athearn & Company[1]
Atlas Traffic Consultants Corp.[1]
Auten Freight Audit
Bekins Transportation & Warehousing Group
Blue & Gray Transportation Co., Incorporated[1]
Boise Cascade Corporation
Bowman Transportation, Inc.
Brown Transport Corp.[1]
Bureau of Investigations and Enforcement Interstate Commerce Commission[1]
Burlington Industries, Inc.
Campbell Sixty-Six Express, Inc.[1]
Central Transport Inc.[1]
CertainTeed Corporation
Chattanooga Freight Bureau, Inc.
Chem Haulers, Inc.
Chicopee Manufacturing Company
Churchill Truck Lines, Inc.[1]
Coastal Tank Lines, Inc.
Commercial Traffic Company
Consolidated Freightways Corporation Delaware[1]
Continental Freight Data Systems, Inc.
Cooper-Jarrett, Inc.
Cotter Associates, Inc.
Dallas Chamber of Commerce, Texas Industrial Traffic League
Davidson Transfer & Storage Co.[1]
Denenholz & Janer, Inc.
Diamond Shamrock Corpration[1]

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[1] Parties filing opening and reply statements.

Parties filing opening statements—Continued

Dow Chemical USA
Drackett Products Company
East Texas Motor Freight Lines, Inc.
Emerson Electric Co.
Frank M. Cushman Associates
Freight Forwarders Institute
Frisco Transportation Company
Frozen Food Express, Inc.
Garrett Freight Lines, Inc.
General Motors Corporation[1]
Georgia-Alabama Textile Traffic Association, Inc.
Georgia Freight Bureau, Inc.
Global Van Lines, Inc.
Great Atlantic & Pacific Tea Company, Inc.
Holland Motor Express, Inc.[1]
Household Goods Carriers' Bureau, Inc.[1]
Household Goods Forwarders Tariff Bureau
J. Crawford Hudgins[1]
Hyman Freightways, Inc.
Imco Container Company
Industrial Traffic Consultants, Inc.
Industrial Traffic Service
Interstate Motor Freight System[1]
Jayne's Motor Freight Inc.
Johnson Motor Lines, Inc.[1]
Jones Transfer Company
K-Mart Apparel Corp.
La Porte Transit Co., Inc.[1]
McLean Trucking Company[1]
Midwest Packers Traffic Association J. B. Montgomery, Inc.
Morton Salt Company
Motor Cargo[1]
Movers Round Table[1]
National Association of Electrical Distributors
  Gift Wrapping & Tyings Association[1]
National Association of Freight Transportation Consultants
National Industrial Traffic League[1]
National Motor Freight Traffic Association, Inc.[1]
National Retail Merchants Association
National Small Shipments Traffic Conference, Inc.
  Drug and Toilet Preparation Traffic Conference[1]
National Transit Corporation
North American Van Lines, Inc.
Overnite Transportation Company
Oxford Chemicals[1]
Pacific Intermountain Express Co.

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[1] Parties filing opening and reply statements.

Parties filing opening statements—Continued

Paragon Traffic Analysts, Inc.[1]
J. C. Penney Company, Inc.
Phillips Petroleum Company[1]
Pilot Freight Carriers, Inc.
Proctor & Gamble Company[1]
Progress National Traffic Service, Inc.
Red Arrow Freight Lines, Inc.
Red Ball Motor Freight, Inc.
Reliable Traffic Service
Reynolds Metals Company[1]
Rockford Area Chamber of Commerce
  Illinois Territory Manufacturers' Traffic League
Rubber Manufacturers Association
Ryder Truck Lines, Inc.
Schuster Express, Inc.
Shippers National Freight Claim Council, Inc.[1]
Southern Furniture Manufacturers Association[1]
Standard Oil Co.
Sterling Drug, Inc.
Summa Audit Bureau
Traffic Associates, Inc.
Traffic Managers Conference of California[1]
Turner's Express, Incorporated[1]
Ward Trucking Corp.
Western Traffic & Auditing Bureau
Western Traffic Conference, Inc.
Williams & Associates Inc.
Yellow Freight System, Inc.[1]
  Republic Freight System, Inc.
  Yellow Forwarding Co.
  Braswell Motor Freight Lines, Inc.
Vity G. Gricius

Parties filing reply statements only

Arizona Traffic Service, Inc.
General Mills, Inc.
K Mark Corporation
Middlewest Motor Freight Bureau
NCR Corporation
Samuel Rubenstein Freight Transportation Consumers, Inc.

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[1] Parties filing opening and reply statements.

APPENDIX C

1. Summary of data on overcharge handling complaints received by the Bureau of Traffic's Section of Rates and Informal Cases for the period [December 1, 1976 to November 25, 1977].

Number of complaints received	297
Number of claims involved	1,169
Number of shipments involved	1,310
Total amount of claims	$114,231.70
Average number claims per complaint	3.94
Average number shipments per complaint	4.41
Average amount per overcharge claim	$97.72
Average amount per shipment	87.20
Sources of complaints:	
Freight rate auditors	268
Shippers	25
Motor carriers	2
Other	2
Objects of complaints:[1]	
Motor carriers	283
Freight forwarders	16
Railroads	10
Other	6
	Percent
Number of complaints eventually paid	140 (47.1)
Number of complaints presumed paid subsequent to I.C.C. inquiry	19 (6.4)
Number of complaints declined	58 (19.5)
Number of complaints awaiting response to I.C.C. inquiry	47 (15.8)
Number of complaints involving claims requiring further development	33 (11.1)
Total complaints	297

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[1] Many of the complaints contained multiple claims against more than one party.

2. Analysis of age of overcharge claims at time of receipt by the I.C.C.'s Bureau of Traffic

a. Claims with individual age at time of receipt known.

Number of claims	Less than 3 months old	3-6 months	7-12 months	13-18 months	19-24 months	25-36 months	More than 36 months old
574	19	55	150	133	105	79	33
100—percent	3.3	9.6	26	23	18.3	13.8	5.7

b. Cumulative table of maturities of claims with individual age at time of receipt known.

Number of claims	Less than 3 months old	Over 3 months	Over 6 months	Over 12 months	Over 18 months	Over 24 months	More than 36 months old
574	19	555	500	350	217	112	33
100—percent	3.3	96.6	87.1	61	37.8	19.5	5.7

c. Schedule of 578 claims whose age was not individually known but whose maturity was indicated only for a group of claims.

Less than 3 months to 6 months	23
Less than 3 months to 18 months	39
From 3 months to 12 months	56
From 3 months to 24 months	15
From 3 months to over 36 months	180
From 7 months to 18 months	73
From 7 months to 24 months	4
From 13 months to 24 months	24
From 13 months to 36 months	42
From 19 months to 36 months	24
From 25 months to over 36 months	61
No dates furnished	37

APPENDIX D

NOTICE

TITLE 49 - TRANSPORTATION
CHAPTER 10 - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A - GENERAL RULES AND REGULATIONS
PART 1008 - PROCEDURES GOVERNING THE PROCESSING, INVESTIGATION AND DISPOSITION OF OVERCHARGE, DUPLICATE PAYMENT, OR OVERCOLLECTION CLAIMS

EX PARTE NO. 342

PROCEDURES GOVERNING THE PROCESSING, INVESTIGATION AND DISPOSITION OF OVERCHARGE, DUPLICATE PAYMENT, OR OVERCOLLECTION CLAIMS

AGENCY: Interstate Commerce Commission
ACTION: Final rules

SUMMARY: These regulations provide uniform procedures for the efficient processing, investigation and timely disposition of overcharge, duplicate payment and overcollection claims by motor common carriers and freight forwarders. They are issued in response to the many complaints received by the Commission concerning extended delays in the disposition of such claims and based upon the comments submitted in this proceeding.

EFFECTIVE DATE:

FOR FURTHER INFORMATION CONTACT:
Janice M. Rosenak (202) 275-7693
or
Harvey Gobetz (202) 275-7656

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by a notice of proposed rulemaking, published in the Federal Register on October 7, 1977 (42 F.R. 54579), to consider the propriety of the practices of motor common carriers and freight forwarders in the processing and disposition of claims of overcharge, duplicate payment, and overcollection for the transportation of household goods, and to determine if new rules are necessary to govern the processing of such claims in a more expeditious manner.

As indicated in the notice, this Commission has received and continues to receive numerous complaints from shippers, receivers, and their representatives respecting the practices of motor carriers and freight forwarders in the processing of overcharge, duplicate payment, and overcollection claims. Essentially, the complaints involve either a failure by motor carriers and freight forwarders to acknowledge such claims, or extended delays in their processing and disposition.

In response to the notice over 150 initial and reply statements have been received. It is evident, that many of the parties recognize the need for uniform procedures to foster prompt and equitable handling of claims. The need for a practical, efficient and workable method of dealing fairly with all concerned parties in processing such claims, and of protecting the public interest in the entire transportation process, is, in essence, the underlying purpose for which this proceeding was commenced.

The proposed regulations as revised and adopted require written acknowledgment of all claims, a strict time limitation for their disposition, and a flexible documentation rule which should substantially improve carrier practices and alleviate the vast majority of complaints concerning recovery or overpayments by shippers. The regulations also provide uniform procedures for the disposition of unidentified payments, overcharges, duplicate payments, and overcollections not supported by claims.

The time lag between overpayment and refund should be reduced substantially by carriers' adherence to these regulations.

A mandatory interest requirement has not been required at this time because we are not persuaded that it would result in any greater compliance with the rules. However, should the Commission's monitoring of the carriers' compliance with these regulations indicate the need for an interest requirement, this matter will be reopened for further consideration.

Complete copies of the decision in this proceeding can be obtained from the Office of the Secretary, Interstate Commerce Commission, Washington, D.C. 20423.

Accordingly, Chapter X of Title 49 of the Code of Federal Regulations is amended by adding a new Part 1008 as follows:

Part 1008—PROCEDURES GOVERNING THE PROCESSING, INVESTIGATION, AND DISPOSITION OF OVERCHARGE, DUPLICATE PAYMENT, OR OVERCOLLECTION CLAIMS

§1008.1 Applicability.

The regulations set forth in this part govern the processing of claims for overcharge, duplicate payment, or overcollection for the transportation of property in interstate or foreign commerce by motor common carriers and freight forwarders subject to part II or IV of the Interstate Commerce Act.

§1008.2 Definitions.

(a) "Carrier" means a motor common carrier or freight forwarder subject to part II or IV of the Interstate Commerce Act.

(b) "Overcharge" means an overcharge as defined in sections 204a (6) and 406a (6) of the Interstate Commerce Act. It also includes duplicate payments as defined in paragraph (c) and overcollections as defined in paragraph (d) of this section when a dispute exists between the parties concerning such charges.

(c) "Duplicate payment" means two or more payments for transporting the same shipment. Where one or more payment is not in the exact amount of the applicable tariff rates and charges, refunds shall be made on the basis of the excess amount over the applicable tariff rates and charges.

(d) "Overcollection" means the receipt by a household goods carrier of a payment in excess of the transportation and/or accessorial charges applicable to a particular shipment of household goods, as defined in part 1056 of this chapter, under tariffs lawfully on file with this Commission.

(e) "Unidentified payment" means a payment which a carrier has received for the performance of transportation services but which the carrier is unable to match with its open accounts receivable or otherwise identify as being due.

(f) "Claimant" means any shipper or receiver, or its authorized agent, filing a request with a carrier for the refund of an overcharge, duplicate payment, or overcollection.

§1008.3 Filing and processing claims.

(a) A claim for overcharge, duplicate payment, or overcollection shall not be paid unless filed in writing with the carrier that collected the transportation charges. The collecting carrier shall be the carrier to process all such claims. When a claim is filed with another carrier that participated in the transportation, that carrier shall transmit the claim to the collecting carrier within 15 days after receipt of the claim. If the collecting carrier is unable to dispose of the claim for any reason, the claim may be filed with or transferred to any participating carrier for final disposition.

(b) A single claim may include more than one shipment provided the claim on each shipment involves (1) the same tariff issue or authority or circumstances, (2) single line service by the same carrier, or (3) service by the same interline carriers.

§1008.4 Documentation of claims.

(a) Claims for overcharge, duplicate payment, or overcollection shall be accompanied by sufficient information to allow the carriers to conduct an investigation and pay or decline the claim within the time limitations set forth in section 1008.8. Claims shall include the name of the claimant, its file number, if any, and the amount of the refund sought to be recovered, if known.

(b) Claims for over charge shall be accompanied by the original freight bill. Additional information may include, but is not limited to, the following:

(1) The rate, classification, or commodity description or weight claimed to have been applicable.

(2) Complete tariff authority for the rate, classification, or commodity description claimed.

(3) Freight bill payment information.

(4) Other documents or data which is believed by claimant to substantiate the basis for its claim.

(c) Claims for duplicate payment and overcollection shall be accompanied by the original freight bill(s) for which charges were paid and by freight bill payment information.

(d) Regardless of the provisions of paragraphs (a), (b), and (c) of this section, the failure to provide sufficient information and documentation to allow a carrier to conduct an investigation and pay or decline the claim within the allowable time limitation shall not constitute grounds for disallowance of the claim. Rather, the carrier shall comply with section 1008.5(c) to obtain the additional information required.

(e) A carrier may accept copies instead of the original documents required to be submitted in this section where the carrier is furnished with an agreement entered into by the claimant which indemnifies the carrier for subsequent duplicate claims which might be filed and supported by the original documents.

§1008.5 Investigation of claims.

(a) Upon receipt of a claim, whether written or otherwise, the processing carrier shall promptly initiate an investigation and establish a file, as required by section 1008.6

(b) If a carrier discovers an overcharge, duplicate payment, or overcollection which has not been the subject of a claim, it shall promptly initiate an investigation and comply with the provisions in section 1008.9.

(c) In the event the carrier processing the claim requires information or documents in addition to that submitted with the claim, the carrier shall promptly notify the claimant and request the information required. This includes notifying the claimant that a written claim must be filed before the carrier becomes subject to the time limits for settling such a claim under section 1008.8.

§1008.6 Claim records.

At the time a claim is received the carrier shall create a separate file and assign it a successive claim file number and note that number on all documents filed in support of the claim and all records and correspondence with respect to the claim, including the written acknowledgment of receipt required under section 1008.7. If pertinent to the disposition of the claim, the carrier shall also note that number on the shipping order and delivery receipt, if any, covering the shipment involved.

§1008.7 Acknowledgment of claims.

Upon receipt of a written claim, the carrier shall acknowledge its receipt in writing to the claimant within 30 days after the date of receipt except where the carrier shall have paid or declined the claim in writing within that period. The carrier shall include the date of receipt in its written acknowledgment and shall also enter this date on the face of the written claim which shall be placed in the file for that claim.

§1008.8 Disposition of claims.

The processing carrier shall pay, decline to pay, or settle each written claim within 60 days after its receipt by that carrier, except where the claimant and the carrier agree in writing to a specific extension based upon extenuating circumstances. If the carrier declines to pay a claim or makes settlement in an amount different from that sought, the carrier shall notify the claimant, in writing, of the reason(s) for its action, citing tariff authority or other pertinent information developed as a result of its investigation.

§1008.9 Disposition of unidentified payments, overcharges, duplicate payments, and overcollections not supported by claims.

(a) Carriers shall establish procedures for identifying and properly applying all unidentified payments. If a carrier does not have sufficient information with which properly to apply such a payment, the carrier shall notify the payor of the unidentified payment within 60 days of receipt of the payment and request information which will enable it to identify the payment. If the carrier does not receive the information requested within 90 days from the date of the notice, the carrier may treat the unidentified payment as a payment in fact of freight charges owing to it. Following the 90-day period, the regular claims procedure under this part shall be applicable.

(b) When a carrier which participated in a transportation movement, but did not collect the transportation charges, finds that an overpayment has been made, that carrier shall immediately notify the collecting carrier. When the collecting carrier discovers or is notified by such a participating carrier that an overcharge, duplicate payment, or overcollection exists for any transportation charge which has not been the subject of a claim, the carrier shall create a file as if a claim had been submitted and shall record in the file the date it discovered or was notified of the overpayment. The carrier that collected the charges shall then refund the amount of the overpayment to the person who paid the transportation charges or to the person that made duplicate payment within 30 days from the date of such discovery or notification.

These rules are issued under the authority of sections 553 and 559 of the Administrative Procedure Act (5 U.S.C. 553 and 559) and sections 204(a)(6), 204a, 208(a), 216(b), 217(b), 404(a), 405(c), 406a, 410(e), and 417(a) of the Interstate Commerce Act.

358 I.C.C.

EX PARTE NO. 326

REGULATIONS GOVERNING THE TRANSFER OF GENERAL INCREASES FROM MASTER TARIFFS INTO THE INDIVIDUAL TARIFFS OF RAILROADS OR RAIL RATEMAKING ORGANIZATIONS

Decided December 8, 1977

Upon investigation, proposed regulations governing the transfer of general increases from master tariffs into the individual tariffs of railroads or rail ratemaking organizations, amended, in part, and adopted as Part 1300.32 of Title 49 of the Code of Federal Regulations.

Andrew C. Armstrong, Robert B. Batchelder, John A. Daily, Harry L. De Lung, Jr., Richard S. M. Emrich III, J. D. Feeney, James L. Howe III, Howard D. Koontz, Joseph M. O'Malley, Albert B. Russ, Jr., John F. Smith, James E. Sykes, R. E. Thompson, Donal L. Turkal, and *John S. Walker, Jr.,* for the railroads.

Robert W. Doubek for the Maritime Administration, United States Department of Commerce.

Dellon E. Coker for the Military Traffic Management Command, Department of the Army.

George H. Morin for the North Dakota Public Service Commission.

C. W. Bath, Oliver Callson, John F. Donelan, Thomas D. Donis, Robert L. Graves, Robert P. Hannigan, James J. Irlandi, Walter E. Johnson, John H. King, James S. Krzyminski, Dickson R. Loos, J. S. McAndrew, Paul G. McQuiston, Eugene J. Mielke, Doyle G. Owens, L. A. Parish, Harold M. Pockrose, Frank E. Polom, Jack E. Richert, Gerald K. Riemer, Charles E. Seaberry, Nelson E. Shineberger, James D. Smith, Edwin M. Wheeler, Frederic L. Wood, and *Gilbert Z. Zizek* for individual shippers and shipper associations.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This rulemaking proceeding was instituted for the purpose of establishing regulations governing the transfer of general increases from master tariffs into the individual tariffs of railroads or rail ratemaking organizations. Revised regulations were necessary to conform Commission procedure[1] to section 209 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act),[2] which sets statutory time limits within which all rates must be incorporated into individual tariffs. Section 209, amending section 6(6) of the Interstate Commerce Act, provides, in pertinent part:

> The Commission shall, beginning 2 years after the date of enactment of this sentence, require (a) that all rates shall be incorporated into the individual tariffs of each common carrier by railroad subject to this part or rail ratemaking association within 2 years after the initial publication of the rate, or within 2 years after a change in any rate is approved by the Commission, whichever is later, and (b) that any rate shall be null and void with respect to any such carrier or association which does not so incorporate such rate into its individual tariff. The Commission may, upon good cause shown, extend such period of time. Notice of any such extension and a statement of the reasons therefor shall be promptly transmitted to the Congress.

A Notice of Proposed Rulemaking and Order (NPRO), published in the Federal Register on July 13, 1976 (41 F.R. 28799), set forth the proposed rules[3] and named all common carriers by railroad as respondents to this proceeding. Interested parties were invited to submit comments.[4]

BACKGROUND

As we noted in the NPRO, a master tariff is a separate tariff filed with the Commission to provide for a general increase in the level of all or substantially all rates and charges in individual tariffs of the railroads and their rate publishing agents. The Commission's tariff circular rules do not authorize the publication and filing of master tariffs. The Commission grants authority to file these tariffs by special permission orders issued in general revenue increase proceedings. These orders also permit the simultaneous filing of connecting-link supplements to individual tariffs to make them subject to the master tariff. These supplements provide the initial link that unites several thousand individual tariffs with a single master tariff.

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[1] The regulations promulgated by this rulemaking amend the Commission's Tariff Circular No. 20 (49 CFR 1300).

[2] 45 U.S.C. 801 (1976).

[3] See appendix A.

[4] For a list of all parties submitting statements in this proceeding, see appendix B.

Master tariffs obviously facilitate the railroads' task of initially publishing nationwide across-the-board rate increases. However, continued use of these tariffs over long periods of time runs counter to the goal of tariff simplification. The legislative history reveals that Congress intended to legislate a solution to the problem of the proliferation of master tariff publications through the enactment of section 209. The Senate Committee on Commerce Report 94-499[5] states, in pertinent part:

> Under present law, the Commission may allow groups of carriers to file master tariff and tariff supplements which, by single publication, apply to numerous individual tariffs. If allowed to persist for a substantial time, this situation causes difficulty for shippers and other interested persons who must refer not only to the basic carrier or association tariff, but also to various master tariffs and supplements, to determine the applicable rate on a particular movement of traffic. The bill would cure this problem by requiring carriers and associations within two years to incorporate rate changes into their basic tariff publications. The Commission may extend this time period in unusual circumstances if it provides Congress with a notice of such extension and a statement of the reasons therefor. It is expected that the Commission will utilize this extension power only in extraordinary circumstances.

Over the years, the railroads have had considerable leeway in updating their individual tariffs. Historically, railroad general revenue proceedings occurred sporadically. Under these circumstances, master tariffs often remained in effect for several years without presenting overly severe problems for tariff users. The situation began to change somewhat in the two decades following World War II when general revenue increases became more frequent. Nevertheless, there were still regular intervals during which no general increase took place. That was the case between 1960 and 1967. Yet by the latter year, many individual tariffs were still not at current levels.

Beginning in 1967, the situation changed abruptly. The last decade has seen an unprecedented succession of general rate increases precipitated by the inflationary spiral characterizing our economy during this period. In spite of this drastic change in the pattern of general increases, the carriers initially made little effort to update their individual tariffs to reflect current levels of rates and charges. As a result, tariff users were soon forced to refer to a series of master tariffs to ascertain applicable rates. This intolerable situation became a matter of paramount concern to the shipping public and this Commission.

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[5] 94th Cong. 1st. Sess. (1975) at page 56.

To meet this problem, the Commission began a program of closely monitoring the progress of the railroads in updating their tariffs. The carriers were admonished in various ex parte increase proceedings that the authorization of a general increase carried with it the burden to update tariffs to reflect the increases at the earliest possible date. The filing of quarterly reports to demonstrate the results of the carriers' updating programs was required. In granting relief from our tariff publishing rules to file master tariffs, we instituted a requirement that these tariffs bear a fixed expiration date. Extensions have been granted only upon a showing of substantial updating progress.

To facilitate the updating task, we issued two outstanding special permissions to provide special publication procedures for bringing general increases into individual tariffs. One of these, special permission No. 71-5875, permits the carriers to file a conversion-table supplement to the tariff to incorporate various increases. This form of publication eliminates the need for tariff users to refer to several master tariffs to ascertain applicable rates, although it still requires one extra step in the rate determination process. Certain limitations were placed on the use of these supplements, as they are intended solely as a temporary measure. The other, special permission No. 71-5508, allows the carriers to file a noncounting supplement that would contain all rates in the tariff at the updated level. These supplements eliminate the need to republish entire tariffs when updating. Which form of publication to use often depends upon the specific characteristics of individual tariffs. These special permissions have given the railroads a degree of flexibility in updating individual tariffs and both have contributed substantially to expedite the process of incorporating general increases into basic tariffs.[6]

Although the rail carriers have made progress in tariff updating over the past few years, there are many exceptions. Congress, in enacting section 209, has provided a statutory basis to insure that all individual tariffs are uniformly updated in an expeditious manner.

COMMENTS OF THE PARTIES ON THE PROPOSED RULES

In general, the parties submitting statements in this proceeding support the rules proposed by the Commission in the NPRO. Where disagreement occurs as to either matter included in or omitted from the rules, the parties have raised the issue and, in certain instances, proffered alternative proposals, including proposed drafts for adoption by the Commission.

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[6] We note that these conversion-table supplements differ from those used by motor carriers. Motor carriers use this form of supplement to implement their general increases, in lieu of master tariffs. Motor carrier conversion-table supplements are strictly monitored and the increases published thereby must be transferred into the basic rates within 1 year.

Certain major issues emerge upon consideration of the representations by the parties. It is the purpose of this section to present the relative positions of the parties with respect to these issues. For a more detailed summary of each of the statements submitted, see appendix C.

Considerable time was devoted by the parties in this proceeding to assessing the progress which has been made by the railroads in tariff updating. These analyses were not necessarily confined to the current status of individual tariffs with respect to incorporation of general increases, but encompassed individual increases as well. Due to the circumscribed nature of this rulemaking, such allegations which are not deemed relevant to the scope of this proceeding will not be discussed.

It is the general consensus, by vitually all parties submitting statements that the railroads have made progress recently in transferring general increases from master tariffs into individual tariffs, but opinion differs as to the sufficiency of the effort expended in accomplishing this task. The railroads are self-laudatory of their updating program and the shippers are generally critical. Statistics are cited on both sides of this issue in support of the parties respective positions. Examples of particularly complicated and archaic tariffs are introduced, presumably to show the magnitude of the problem and the need for regulation. Although this input by the parties is enlightening, in that it attempts to depict the actual condition of current tariff publications, we will dispense with further discussion on this point, since Congress has statutorily recognized the need for regulatory reform in this area and the rules being promulgated herein implement the legislative mandate as set forth in the statute.

Almost all of the parties in this proceeding address the issue of the use of conversion-table supplements. Opinion as to the propriety of continuation of this method of tariff updating falls generally into three categories.

A number of parties advocate cancellation of outstanding special permission No. 71-5875, authorizing the publication and filing of single conversion-table supplements. Opposition to conversion-table supplements is based upon the belief that this method of tariff updating is contrary to the legislative intent of the statute. Under the statute, general increases must be incorporated into the basic tariffs within a period of 2 years. Transferring increases from master tariffs into conversion-table supplements is not considered to be incorporation into the basic tariffs, by parties holding this position. Although all tariff references would be consolidated into a single volume, it is argued that the number of separate references would not be reduced and, thus, the ultimate difficulty posed to the tariff user in ascertaining a particular rate would remain the same.

The majority of the parties, although opposed to conversion-table supplements as a permanent method of tariff updating, acquiesce in their use on an interim basis. It is generally acknowledged that conversion-table supplements are an expeditious and inexpensive way of providing up-to-date tariffs prior to the expiration of the 2-year statutory period. The parties propose various alternatives for limiting the effective life of the conversion tables which range from a 3 to 7-month expiration date on the special permission orders authorizing conversion-table supplements, to eventual phaseout of the entire method.

The remaining group, which is relatively small, is comprised of the railroads and those shippers who find conversion-table supplements to be consistent with the intent of the Congress in enacting section 209. The National Industrial Traffic League, in particular, contends that conversion-table supplements are as much a part of the basic tariff as are any other supplements appended to the publication. Thus, the requirement that the carriers transfer general increases into the basic tariffs is not violated by this practice of tariff updating. Moreover, the carriers note that currently, conversion-table supplements are included only in approximately 7 percent of their tariffs. The railroads also propose that an addition be made to the definition section of the proposed rules, defining the word transfer. The definition drafted by the railroads delineates the acceptable methods of incorporating general increases into the basic tariffs, specifically recognizing conversion-table supplements as a permissible alternative. In addition, the railroads advance the argument that the current 6-month limitation, during which conversion-table supplements may refer to additional master tariffs, be extended to 2 years in order to conform to the general 2-year time period provided for under section 209.

The advantages of conversion-table supplements, as cited by the parties, are that they are inexpensive, reduce reproduction costs, and provide a means for up-dating tariffs in less than the 2-year time frame. If issued promptly and on an interim basis, most parties feel that conversion-table supplements are a useful tool in the tariff updating process.

The alleged disadvantages found to exist in employing this method are that it contributes to ambiguity and complexity in tariff rate retrieval, as opposed to incorporation into the individual rates without the use of supplements. Although tariff users no longer need to refer to several separate master tariffs when these supplements are in effect, their use still requires an extra step to determine applicable rates. Moreover, several parties assert that errors are frequently made in these supplements, forcing shippers to pay excessive charges until the mistakes are corrected. If conversion-table supplements are to be continued, these parties urge that the carriers be permitted to correct these errors on less than statutory notice. Outstanding special permission No. 76-2360 currently permits carriers to correct errors made in updating on 5 days' notice, therefore, no further action is necessary concerning this suggestion.

There have been numerous requests to formulate regulations which would require the railroads when updating their individual tariffs to impose increases no greater than authorized in the master tariff. These suggestions are proffered not only as a sanction against the use of the predominant article theory, but also as a method of curtailing tariff publication errors which result in greater than authorized charges.

The predominant article theory is generally applied in situations where different increases are applicable to the individual commodities included in a broad grouping of articles under a main heading in the Standard Transportation Commodity Code (STCC). Under this theory, the increase applicable to the predominant article within the group determines the increase to be applied to all commodities within the group. Several different standards are employed to ascertain which is the predominant article. For example, the predominant article may be based upon the largest number of commodities within the group taking a like increase or upon the commodity being transported by the railroads in the largest volume.

Certain parties contend that the use of the predominant article theory has resulted in situations where commodities bearing the highest increase have been designated as the predominant article, and the greatest increase has been applied to all commodities within the group, even though the Commission in a general increase proceeding may have authorized a lesser increase on some of the individual articles. Suggested sanctions include compelling railroads to apply the lowest increase authorized on a commodity group to all commodities covered by the rate item and a requirement that all STCC numbers be included within the commodity descriptions at the time of publication. As a remedial measure, several parties advocate the adoption of a rule which would provide for the automatic refund of charges paid in excess of authorized general increases resulting from errors in transferring the increase from the master tariffs into the individual tariffs. The current procedures for obtaining refunds are considered to be too protracted.

The Aluminum Association, Inc., drafted the following proposed regulations to be added after section 1300.32(e), pertaining to the predominant article theory and other alleged errors in updating tariffs.

> (f) No greater increase than that authorized by the Commission or published in the master tariff may be imposed on the basic individual tariffs. Publications effecting the transfer of increases from master tariffs must bear an appropriate symbol denoting no change in rates as provided in section 1300.2 of these regulations.
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> (g) In transferring increases authorized by a master tariff to rate items covering a group of commodities subject to varying increases in the master tariff, the lowest increase authorized for the commodity group shall be applied to the rate item.
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> (h) Tariffs which result in greater increases than authorized by the Commission, or greater than published in the master tariff, as a result of the transfer publication, shall be deemed unlawful. All such transfer publications shall contain appropriate refund provisions providing that charges paid by shippers in excess of the authorized or published increase shall be refunded by the carrier.

In reply to the arguments concerning prohibiting the use of the predominant article theory, the railroads maintain that consideration of this issue is outside the scope of this proceeding. They further contend that any problem associated with this theory can be resolved when updated tariffs are published. These tariff publications are subject to protest, suspension, and investigation. The railroads believe that any arguments relating to the predominant article theory can be resolved at the suspension level.

We agree with the railroads that this rulemaking proceeding, which is limited in scope, is not the proper forum for consideration of regulations of the type suggested by the Aluminum Association, Inc. However, we disagree with the railroads' contention that problems associated with the predominant article theory should be resolved on a case-by-case basis requiring the shipper in each instance to restate the problem. Accordingly, we propose, with notice to railroads and all parties to this proceeding, to institute a rulemaking proceeding to consider the applicability of the predominant article theory and other matters relating to the publication of updated tariffs.

The last major issue raised by the parties concerns the time allotted by the statute for tariff updating. There are those that feel that 2 years is too much time. This argument, however, is not relevant, since the statute expressly allows the railroads a 2-year period in which to incorporate increases into individual tariffs. Others approach the problem by advocating that the criteria for updating tariffs not be exclusively measured in terms of time, but by maximum number of increases. A sanction which has been proposed by a number of parties is to require the Commission to exercise its discretion by refusing to grant additional general increases where tariffs have not incorporated previous increases. As a corollary to this, much comment has been directed toward part (e) *Extension of time period.* Several parties urge that this section be eliminated and that no extensions be considered by the Commission. One party notes that there is no provision for notice to the shipping public when petitions for extension are filed. It suggests an amendment to this part to provide for actual notice. The railroads oppose section (e) on the basis that the language in that section is more restrictive than the statutory language that extensions of time may be granted for "good cause shown." The railroads also request that the period for filing petitions for extension be shortened from 90 to 30 days.

Discussion and Conclusions

The statutory requirements became effective with the enactment of section 209 of the 4R Act on February 5, 1976. All master tariffs on file with the Commission on or after that date are governed by this section. The statute allows the railroads or their tariff publishing agents a 2-year period within which to incorporate authorized general increases into individual tariffs. Thus, general increases in effect for 2 or more years must be incorporated into individual tariffs beginning February 5, 1978. Any increases not so incorporated will be void.

The proposed rules do not specify how general increases are to be transferred from master tariffs into individual tariffs. The railroads currently use several methods to update their basic tariff publications to incorporate general increases, including conversion-table supplements. The conversion-table supplement is one of two special publication procedures we have permitted the railroads to use in the interest of expediting the process of transferring various general increases into basic tariffs.

In the NPRO, we announced that the special permission to use conversion-table supplements would not be withdrawn at this point.[7] At the same time, however, we invited parties to the proceeding to comment on the continued use of these supplements. As mentioned previously, virtually every party addressed this issue. The majority of these parties confined their comments to the merits of this form of publication. Only a few parties specifically discussed whether conversion-table supplements are proscribed by the statute, with opinion on this subject divided. A threshold question that must be resolved, therefore, is whether section 209 of the 4R Act precludes use of these supplements in the updating process.

We are convinced that the statute does not prohibit use of conversion-table supplements to update individual tariffs. The statutory language is plain. It provides that general increases must be incorporated into individual *tariffs* of the railroads or their ratemaking associations within 2 years. The statute does not require incorporation of general increases into individual *rates*. As borne out by the legislative history cited earlier, congressional intent in enacting section 209 was to limit the life of separate master tariffs. Congress was concerned with the problem created for shippers when basic tariffs are subject to numerous master tariffs for long periods. To alleviate this problem, Congress established a statutory time frame within which general increases must be incorporated into the railroads' basic tariff publications.

A tariff publication, whether it be a rate tariff, a master tariff, or some other tariff, consists of the original tariff and its supplements. A tariff user must always refer to the original tariff and its current supplements to determine an applicable rate. When updating tariffs, the carriers either reissue the entire tariff or amend the existing tariff. The conversion-table supplement is simply one method available for amending individual tariffs to transfer general increases. When carriers elect to use this method, the conversion-table supplement issued specifically amends the tariff and applies to that tariff only. These supplements are not single supplements that are filed to numerous tariffs. A conversion-table supplement is just as much a part of the tariff as any other supplement filed thereto.

The 4R Act mandates that master tariffs expire after 2 years and requires that the railroads bring increases published by this means into their basic tariffs within that time. As revealed by the legislative history, the primary purpose of this section is to reduce the time shippers have to refer to separate master tariffs when checking rates. This is the purpose of conversion-table supplements. These supplements were initially authorized to accelerate the tariff updating process. The parties concede that they have contributed greatly to the progress the railroads have made in updating tariffs over the past several years. Moreover, it is apparent from the record that without this and other temporary short-cut publication procedures some of the carriers would not be able, at this time, to meet the statutory deadline. In enacting a strict statutory time limit for transferring general increases from master tariffs into individual tariffs, we do not believe that Congress intended, at the same time, to limit the means for achieving the statutory mandate. We conclude that the statute does not preclude use of conversion-table supplements to update tariffs.

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[7] Chairman O'Neal dissenting.

We are not persuaded, however, that the special permission authority to use conversion-table supplements should be continued indefinitely, as urged by the railroads. When this special permission was initially granted, it was intended solely as a temporary expedient. The special permission has always borne a fixed expiration date. Although this date has been extended on various occasions, this has been done only upon a showing of definite progress in tariff updating and that use of these supplements was necessary to the continued maintenance of such progress. The special permission is currently scheduled to expire February 4, 1978. The evidence shows that the circumstances that first justified this authority still exist for a few carriers, particularly those in the East. It is apparent that a further 1-year extension is warranted if the eastern carriers are to be able to meet the statutory time limit.

We, nevertheless, feel that the time has arrived to begin phasing out use of conversion-table supplements. The carriers' own figures show that only 7 percent of their tariffs have been updated by the conversion-table method. These tariffs will eventually have to be amended to bring the increases from the conversion-tables directly into the rates. We believe the long range interests of both the railroads and the shipping public would best be served if the carriers were to redirect their updating efforts so that the increases are incorporated directly into the rates when initially transferred from the master tariffs into these few tariffs. The extension of the expiration date of special permission No. 71-5875 to February 4, 1979, should give the railroads sufficient time to make this adjustment. We shall expect them to proceed promptly at this task. Carriers are advised that this outstanding special permission will not be further extended. Thereafter carriers will be required to seek specific authorization on an individual tariffs basis to publish these supplements. Authority to use conversion-table supplements beyond this period will only be granted in extraordinary circumstances and upon a clear showing that other methods of tariff updating are not feasible.

The carriers are further advised that any grant of authority will be subject to the condition that funds generated by the applicable increases published in the conversion-table supplement, so extended, must be segregated in a separate account to be used for the purpose of tariff updating. Relief from this condition will be granted only upon a showing of extraordinary circumstances.[8]

As to the rules themselves, the parties generally favor their adoption. The only sections that drew substantial comments were those providing for definitions and extension of the time period.

The railroads suggest an amendment to the definition section to provide for a specific explanation of the term "transfer." The proposed definition would include references to special permission No. 71-5875 which permits the use of conversion-table supplements. In their replies, certain parties oppose this amendment as it would permanently incorporate this publication procedure in the rules. In view of our earlier conclusions regarding the continuance of conversion-table supplements, we shall not adopt this proposal. Moreover, we do not believe that it is necessary to define this term. General increases are to be transferred using normal tariff publishing procedures or other procedures that may be authorized by special permission authority, as conditions warrant. This is obvious. It would be redundant to spell this out in the rules and inappropriate to include current special permissions that are temporary in duration.

The only section of the proposed rules that generated controversy was paragraph (e) governing extensions of time. This section contains a prefatory statement that extensions are not contemplated. It then provides that, when extensions become necessary, requests must be filed with the Commission at least 90 days before the expiration of the 2-year period for transferring increases under paragraph (d).

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[8] In certain instances, the funds to be segregated in a separate account may exceed those which can reasonably be expended for necessary tariff update. The Commission in such cases may grant partial relief upon the filing of an appropriate petition and require the segregation of a lesser amount of funds in the separate account.

The statute expressly provides that the Commission may upon good cause shown, extend the 2-year period. The caveat at the beginning of proposed regulation (e), that extension of the time period for the transfer of general increases from master tariffs to other tariffs is not contemplated, embodies the legislative intent as expressed in the Senate Committee on Commerce Report 94-499. In the report it is stated that it is expected that the Commission will utilize this extension power only under extraordinary circumstances. The proposed regulation clearly conveys this message and needs no additional language to insure that such will be the case.

Furthermore, attached to the authority to grant extensions is a requirement that we notify Congress promptly of any extensions, with a full statement of the reasons therefor. If Congress had intended the extension power to be open ended, we do not believe it would have attached this reporting condition. We interpret the inclusion of this requirement in the statute as a clear indication that Congress desired that this authority be exercised sparingly.[9]

In addition to this introductory language, we shall also retain the provision requiring petitions for extension to be filed 90 days before the time period is due to expire. The railroads advocate a reduction in the 90-day filing period to 30 days. The 90-day time frame is necessary to permit proper consideration of these petitions and, at the same time, allow adequate time for the carriers to complete the updating task should a petition be denied.

As to the request to amend this paragraph to provide for notification to the parties, we believe there is merit to this suggestion. However, we shall not adopt the amendment proposed. This proposal would require the railroads to give actual notice to all tariff subscribers. In our view, it is unrealistic to require service on all tariff subscribers. This requirement would place an undue burden upon the carriers. We shall instead add the following provision to paragraph (e):

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[9] On December 1, 1977, a petition entitled "Petition for Extension of Time Period in Which to Transfer General Increases from a Master Tariff to the Basic Tariffs of Individual Railroads and Rate Bureaus" was filed on behalf of railroads in eastern, southern, and western territories. Although the petition was accompanied by verified statements, it does not appear to have been served on parties to this proceeding or on parties to the general increase proceedings wherein the filing of master tariffs sought to be extended were first authorized. The railroads are advised that the Commission will not act on this petition until a certificate of service is filed stating that parties to this proceeding have been served and a 20-day reply period has expired. The carriers are further advised that grants of relief, if any, may be of limited duration and conditioned upon the expenditure of funds for specific purposes. The carriers are urged to reconsider their request, and are placed on notice that the mere filing of the petition does not establish the extraordinary circumstances on which a grant of relief must be based.

> A copy of the petition shall be simultaneously mailed by first-class mail to each party of record in the general rate increase proceeding for which the extension is being requested and that fact shall be evidenced by a certificate of service filed with the petition. A copy of the petition shall be furnished to any interested person upon request. Any reply shall be filed with the Commission promptly after the petition is filed but in no case more than 20 days after the filing of the petition.[10]

Findings and Conclusions

Upon consideration of all comments and replies received in response to the NPRO, we find that the regulations, as amended, set forth in appendix D are necessary and warranted and should be prescribed as Part 1300.32 of Title 49 of the Code of Federal Regulations. These procedures should be of considerable aid in achieving the statutory objective of transferring general increases from master tariffs to basic tariffs within 2 years.

We further find that the decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

APPENDIX A

PROPOSED REGULATIONS

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER D - TARIFFS AND SCHEDULES
PART 1300 - FREIGHT TARIFFS; RAILROADS, WATER CARRIERS, AND PIPELINE COMPANIES SUBJECT TO SECTION 6 OF THE INTERSTATE COMMERCE ACT AND CARRIERS JOINTLY THEREWITH

§ 1300.32 is added and reads as follows:

§ 1300.32 TRANSFER OF RAILROAD GENERAL INCREASES FROM MASTER TARIFFS

(a) *General application.*

The regulations in this section govern the transfer of railroad general increases from master tariffs into basic tariffs as required by section 6(6) of the act, as amended February 5, 1976.

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[10] The only additional amendment to the proposed rules is to correct an inadvertent omission appearing in paragraph (d)(1)(i).

(b) *Definitions.*

(1) The term "general increase," as used in this section, refers to increases in railroad rates and charges published and filed in accordance with procedures set forth in Part 1102 of this chapter;

(2) The term "master tariff," as used in this section, refers to a separate tariff providing for a general increase in rates and charges which form of publication is authorized by the Commission.

(c) *General increases must be transferred.*

A general increase published by means of a master tariff must be transfered into the basic tariffs within the time period provided under paragraph (d) of this section.

(d) *Time period for transfer of general increases.*

(1) A general increase shall be transferred from a master tariff to the basic tariffs: (i) within 2 years from the effective date of the master tariff if the Commission authorizes the general increase to become effective without suspension; or (ii) if the increase is suspended or an investigation is instituted within 2 years from the date of service of the Commission's final order authorizing the increase in whole or in part;

(2) If a general increase is under investigation by the Commission at the time a later general increase becomes effective, the date for compliance with paragraph (d)(1) of this section shall be determined by reference to the date of service of the Commission's final order relating to the prior increase. Thus, the date determined under paragraph (d)(1) for transfer of the prior increase shall also govern transfer of the later increase.

(e) *Extension of time period.*

Extension of the time period provided under paragraph (d) of this section for transfer of general increases from master tariffs to other tariffs is not contemplated. Should the filing of a petition requesting authority to extend the time period become necessary, such petition must be filed with the Commission at least 90 days before the time period is due to expire.

APPENDIX B

List of parties submitting statements

Aluminum Association, Inc.
American Cyanamid Company
American Plywood Association
Beaumont Chamber of Commerce
Board of Trade of the City of Chicago
David J. Joseph Company
Farmland Industries, Inc.
Fertilizer Institute
FMC Corporation
FS Services, Inc.
Garvey, Inc.
General Mills, Inc.
Georgia-Pacific Corporation
Grain Processing Corp.
L. A. Parish Company
Luria Bros. & Co., Inc.
Maritime Administration, United States Department of Commerce

Military Traffic Management Command, Department of the Army
National Council of Farmer Cooperatives
National Industrial Traffic League
National Oats Company, Inc.
North Dakota Public Service Commission
Penick & Ford, Limited
Phillips Petroleum Company
Pillsbury Company
Railroad Respondents
Salt Institute
Southern Hardwood Traffic Association and Southeastern Lumber Manufacturers Association
Wisconsin Paper and Pulp Manufacturers' Traffic Association

APPENDIX C

Initial statements

1. *The Aluminum Association, Inc.*, urges the Commission to adopt a remedial regulation allowing for an automatic refund for charges in excess of authorized ex parte increases which result from errors in transferring general increases from master tariffs into the individual tariffs of railroads or rail ratemaking organizations. The Aluminum Association cites at least one instance (*Canadian National Railway* v. *United States*, civil action No. 74-167) in which the eastern railroads contended that once an increase has been republished in an individual tariff, the Commission's ex parte orders are no longer effective. According to the Aluminum Association, acceptance of this proposition would in effect permit carriers to impose an unauthorized new rate upon shippers, under the guise of tariff updating.

The Aluminum Association also requests the Commission to adopt a regulation which will compel the railroads to apply the lowest increase authorized on a commodity group to all commodities covered by a rate item. This regulation is designed to eliminate the problem of the predominant article theory as it affects the general increase updating process. The theory has been applied by the railroads in situations where groups of commodities are included in a single rate item. In many instances, general increases provide varying amounts on the commodities within the group. Occasionally, the railroads have followed the practice of applying the same increase to the whole group of articles on the theory that the largest number of commodities within the group taking a like increase will determine the increase applicable to all commodities within the group. In practice, this has resulted in commodities bearing the highest increase being designated as the predominant article, thus, applying the greatest increase to all commodities even though the Commission's order may authorize a lesser increase on many of the articles within the group.

In order to carry out the congressional objective of reducing tariff complexity, the Aluminum Association suggests the Commission adopt a regulation which will prohibit application of an increase to any commodity which is subject to two or more master tariff increases.

The proposed additional regulations drafted by the Aluminum Association to be added after section 1300.32(e) are as follows:

> (f) No greater increase than that authorized by the Commission or published in the master tariff may be imposed on the basic individual tariffs. Publications effecting the

transfer of increase from master tariffs must bear an appropriate symbol denoting no change in rate as provided in section 1300.2 of these regulations.

(g) In transferring increases authorized by a master tariff to rate items covering a group of commodities subject to varying increases in the master tariff, the lowest increase authorized for the commodity group shall be applied to the rate item.

(h) Tariffs which result in greater increases than authorized by the Commission, or greater than published in the master tariff, as a result of the transfer publication, shall be deemed unlawful. All such transfer publications shall contain appropriate refund provisions providing that charges paid by shippers in excess of the authorized or published increase shall be refunded by the carrier.

2. ***American Cyanamid Company***, a diversified pharmaceutical, chemical, and agricultural company, is in general agreement with the 2-year tariff updating requirement. However, it is sympathetic with the rail carriers reluctance to incorporate general increases into their basic tariffs which have not been made permanent by the Commission. Therefore, it requests the Commission to make all general increases permanent with a 2-year period because failure to do so would make the rates null and void, and, thus, would act as a penalty to shippers, as well as carriers.

American Cyanamid Company supports the use of conversion-table supplements to offset the necessary procedural delay resulting from the 2-year period alloted for tariff updating.

It attributes the prevalent use of the predominant article theory to the recent rush to update tariffs. Use of the predominant article theory arises in two contexts. First, if a commodity is not assigned an STCC number, the highest increase will always apply and shippers must petition the railroads for the increase that should apply to that class of product or at least to assign a specific STCC number to that commodity. Second, where higher-rated products are grouped with lower-rated products, under the predominant article theory, the entire item is subjected to higher increases in the master tariff increase tables. American Cyanamid Company proposes a solution to this type of rate publication. The proposal is that all STCC numbers be included in the commodity descriptions at the time of publication. Also, that the railroads should be given a specified amount of time to add existing or new STCC numbers to all presently published rates.

3. ***American Plywood Association***, a trade association, contends that the proposed regulations requiring only the transfer of general increases from one tariff to another would do little to solve existing problems encountered in rate quotations. Specifically, special permission No. 71-5875, which allows for the use of single-line conversion-table supplements, circumvents the intent of amended section 6(6) of the act. The conversion-table method requires that calculations be made from the basic tariff to the conversion table, which still necessitates allowances for holddowns and flagouts. American Plywood Association advocates the use of special permission No. 71-5875 within the 2-year time frame, as an interim method of updating tariffs. It argues that conversion-table supplements should not be allowed to become a permanent vehicle for updating tariffs and that section 6(6) should be allowed to go into effect February 5, 1978.

4. ***Beaumont Chamber of Commerce*** recommends that the proposed regulations include provisions which would limit the number of master tariffs to which a rate could be subjected and would place a limit on the length of time a conversion-table supplement could be in effect. Beaumont Chamber of Commerce argues that there

should never be at any one time, more than one permanent and one pending increase to be applied to a base rate. A rule should be adopted which would not allow a new increase to become effective until the previous increase has been incorporated into the rate or rate scale. Conversion-table supplements could be used as a temporary measure in the tariff updating process, limited to a life of 6 or 7 months.

5. *The Board of Trade of the City of Chicago* is of the opinion that the 2-year time period is adequate for the railroads to accomplish updating their individual line tariffs since these publications are under their exclusive control. Also, carrier testimony in prior proceedings has shown that bureau publications are being updated.

The Board of Trade does not support the use of conversion-table supplements and argues that the amended statute does not specifically provide for use of this method of updating tariffs.

In regard to section 1300.32(e), the Board of Trade cannot foresee any situation in which the railroads would need an extension of time beyond the 2-year period in order to comply with the statute. The Board of Trade believes that once the railroads are given the option of an extension, they will continue to rely on the additional time to extend the 24-month period to 27 months or more.

6. *The David J. Joseph Company*, national brokers and processors of scrap iron and scrap metal, support a concept of tariff updating which would require incorporation of the last permanent increase, with the balance of the tariff subject to one master conversion chart. Tariffs constructed on a point-to-point basis contain numerous rates. It would entail a considerable amount of time to implement the actual updating should the Commission require current tariffs to be maintained. The David J. Joseph Company suggests a two-step procedure be adopted requiring all supplements to the basic tariff to be maintained at the most current level and requiring the basic tariff updating process be completed with a reasonable period of time. The criteria for determining when republication is necessary would be a stated maximum number of increases.

The David J. Joseph Company predicts that constant issuance of special permission orders to convert increases into conversion tables will eventually lead to more confusion and chaos in tariffs, especially if the trend in numerous rate changes continues.

It requests the Commission to include in its order, permission to correct tariff publication errors on short notice, *e.g.*, 5 days, and to allow for refunds of overcharges when claims are presented due to such errors. These provisions are deemed importance because many typographical and clerical errors are not found for some time, due to computerization of rates for billing purposes. Generally, errors can only be discovered in a post-audit check of the tariff for an improperly published or omitted rate.

7. *Farmland Industries, Inc. (Farmland)*, a farm cooperative, is in general agreement with the proposed regulations, subject to the following exceptions. Farmland advises that no more than one increase be permitted in the basic tariff at one time. No extensions of time to incorporate the master tariff into the basic tariffs should be permitted. In the event an extension of time for updating is necessary and is granted, all interested shippers should be notified promptly of the extension. Farmland is opposed to the substitution of conversion tables. It argues that had Congress intended the conversion table to be used, it would have provided for it in the statute. As an alternative, Farmland proposes that conversion tables be substituted for a short period of time, perhaps 6 months.

8. *The Fertilizer Institute*, a national trade association, takes exception to the method of transferring general increases into base rate tariffs by use of conversion-table supplements. The Fertilizer Institute contends that conversion-type supplements are not practical. It cites examples to show that conversion tables are confusing and the savings to be derived from their use are questionable. The Fertilizer Institute, therefore, recommends cancellation of special permission order No. 71-5875, authorizing the use of conversion-table supplements and, in lieu thereof, adoption of regulations requiring the carriers to incorporate the increases into the individual base rates within the 2-year time limit provided by statute.

The Fertilizer Institute also finds the predominant article method of incorporating general increases to be in direct violation of Commission orders. This theory has been utilized in bringing forward into tariff supplements, only the increases applying to the predominant articles in an item or description. In practice, railroads have been applying increases that apply to the majority of the commodities in the descriptive list. If one or more of the commodities listed takes a different increase, as ordered by the Commission, the carriers ignore the Commission's decision in the general increase proceeding and apply the same increase to all commodities in the descriptive list.

Due to the numerous mathematical and typographical errors occurring in the transfer of general increases to base rate tariffs and because of the difficulty experienced in obtaining refunds, the Fertilizer Institute recommends that the following refund rule be added to the proposed regulations:

> In the event an error results from the incorporation of the general increases into the base rate tariff, carriers will refund the amount collected in excess of the increase granted by the Interstate Commerce Commission under the general increase proceeding, with 4-percent interest, upon shippers' application to the freight claim department of the carrier.

9. *FMC Corporation*, a producer of packaging, films, machinery, and chemicals, proposes that general increases made permanent by the Commission be required to be transferred into the individual and agency tariffs within 1 year of the date the increase is made permanent, subject to one master conversion table reflecting those increases not yet made permanent by the Commission. As a sanction to this regulation, FMC would impose a requirement that no general increase be granted by the Commission until the last permanent increase has been transferred into the individual tariffs of each carrier or rail ratemaking association.

10. *FS Services, Inc.*, a system of farm cooperatives, takes the position that extensions of the 2-year time period for transferring general increases from master tariffs into basic tariffs should only be granted in highly unusual circumstances. This would not include a situation where a State within a particular railroad or rail ratemaking organization's territory has not yet adopted the master tariff being considered.

In addition, railroads and rail ratemaking associations should not be allowed to publish and file conversion-table supplements to meet the 2-year tariff updating requirement. The intent of section 209 is to have the current rate shown in the tariff itself and not in a conversion-table supplement. Conversion-table supplements should be allowed only when an increase is transferred from a master tariff during months prior to the end of the 2-year statutory period. At the end of that period, all rates should be incorporated into the tariffs themselves and all conversion-table supplements canceled.

11. *Garvey, Inc.*, is an advisory and management service for agricultural oriented businesses. It urges the Commission to order the railroads to increase rates in specific publications directly to the rate items and not by means of conversion-table supplements. It is alleged that conversion tables, although helpful to a degree, add yet another step in the rate checking process, which is time consuming and expensive. Garvey argues that it was the intent of Congress in passing section 209 of the 4R Act that rates be published at the current rate level and not in conversion supplements and, that if that had been their intent, Congress would have specifically provided for the use of conversion supplements in the statute. Furthermore, Garvey maintains that the railroads have the requisite data processing systems and personnel to accomplish the goal of tariff updating.

12. *General Mills, Inc.*, hopes that extensions granted by the Commission will be held to a minimum and recommends three guidelines for reducing the workload in applying ex parte increases and in transferring the master tariff increases into the individual lines and bureau tariffs.

First, the Commission should provide guidelines to promote uniformity in geographical groupings in ex parte applications. With each new general increase, there are often departures from previous general increases requiring corrections of previous tariffs.

Second, the Commission should implement rules requiring application of the same general increase percentage for products included in the same rate item in the original tariff.

Third, each ex parte increase over a given base amount, should be authorized on a consolidated cumulative basis, offering alternative methods for the payment of rates during the interim period until the increase has been transferred from the master tariff into the original rate tariff. Under the cumulative method of applying increases, shippers would have the option of applying increases by surcharge, mechanical or computer calculation, or by use of rate tables, and still arrive at the same total charge. The advantages to be derived in employing the proposed method would be to provide the most efficient alternative to shipper or carrier operations and provide the tariff published with the least burdensome method of updating tariff rates. In addition, the proposal would provide a more expedient means by apply ex parte general increases to the tariff rates during the interim period, which will add in simplifying tariff publication.

Fourth, conversion-table supplements should not be considered in compliance with a rule requiring the transfer of ex parte increases from master tariffs into original, individual or bureau rate tariffs. Once a conversion table has been published, General Mills argues that the majority of the preparatory work of republishing rates has been accomplished. The remaining steps necessary for incorporating the conversion-table increase are minimal. The conversion-table method, therefore, should only be utilized on a temporary basis.

13. *Georgia-Pacific Corporation* is an integrated forest products manufacturer. It takes issue with the proposed rules since they would only require rail carriers to transfer general increases from master tariffs into single-line tariff supplements. This would do little to correct the problems encountered in applying general increases. The only solution, according to Georgia-Pacific, is to transfer the increases into the individual rates as Congress intended. In this regard, special permission No. 71-5875, which authorizes conversion-table supplements, circumvents the intent of Congress and, thus, should be canceled.

14. *Grain Processing Corporation* supports the proposed regulations with the exception of paragraph (e), providing for an extension of the time period. It avers that this paragraph is contrary to the legislative intent of the statute, which is to prevent long delays.

15. *L. A. Parish Company*, independent transportation consultants, cites statistics derived from statements by various tariff publication bureaus and rail carriers showing the number of tariffs in each territory and the current ex parte master tariffs in effect to which they apply. It recommends the following additions be made to the proposed regulations. Add subparagraph (iii) to section 1300.32(d):

(iii) and in no event shall more than two General Increase master tariffs be in effect at any one time (including those under suspension or investigation);

Amend section 1300.32(e) by adding the following sentence:

All tariff subscribers shall be notified of any petition filed for extension of time and shall have the right to reply thereto and be heard on the petition.

In addition, L. A. Parish Company recommends that the following conditions be attached to special permission No. 71-5875 (or any other similar special permission now in effect or subsequently granted):

(a) Any Conversion Table supplement issued under authority of this Special Permission shall expire seven (7) months from the effective date of such supplement and may not be reissued.

(b) On and after January 1, 1977, any Conversion Table supplement issued under authority of this Special Permission shall contain conversions from only one General Increase Master Tariff, and no such supplement shall be permitted which combines increases from two or more Master Tariffs.

16. *Luria Brothers & Co., Inc.*, submits the following suggestions for consideration by the Commission: 1) that the criteria for the proposed regulations not be one of time exclusively, but also maximum number of master tariffs to be in effect within a given time frame; 2) that the congressionally mandated 2-year time limitation be incorporated into Tariff Circular 20; and 3) that errors in tariff publication should be corrected in a more timely manner than the 30-day statutory period, therefore, the short notice relief in special permission order No. 76-2360 should be continued.

17. *The Maritime Administration, United States Department of Commerce*, advocates limiting the present widespread use of conversion-table supplements. It argues that the proposed regulations, by merely requiring that general increases be transferred into the individual tariffs rather than requiring that the increases be incorporated into the individual rates, frustrates the intent of Congress. Under the proposed regulations, although all tariff references would be contained in a single volume, the ultimate difficulty posed to the tariff user would remain unchanged. This is because the difficulty of determining a rate depends entirely on the number of separate references which must be checked. By using conversion-table supplements, the actual number of such references would not be reduced. The Maritime Administration, therefore requests that special permission No. 71-5875 be withdrawn and the proposed rules be modified to include a requirement that general increases be incorporated into the individual rates within reasonable time periods.

18. *Military Traffic Management Command, Department of the Army* (MTMC) concurs with Chairman O'Neal's dissent to the NPRO. It is MTMC's position that conversion-table supplements do not meet the statutory requirements of the 4R Act as set forth in the legislative intent. The chances of error in tariff interpretation is enhanced by multiple use of increases and conversion tables due to the greater number of figures to compute. The intent of Congress in enacting the 4R provision under consideration was to enable tariff users to go to the basic tariff and in a single step, check out the correct rate. If the supplement remains in effect longer than the 2-year period, the intent of the statute would be frustrated. The conversion method, although advantageous in that it reduces reproduction costs, contributes to ambiguity and complexity of tariff-rate retrieval. The preferred method of updating tariffs is to increase the basic rates by means of one master tariff containing a 2-year mandatory expiration date, thereby forcing carriers to update their rates.

19. *The National Council of Farmer Cooperatives* (National Council) cites legislative history contained in Senate Committee on Commerce Report No. 94-499, 94th Cong., 1st Sess. §56 (1975) for the proposition that Congress did not intend to sanction the use of conversion-table supplements beyond the 2-year statutory period. It argues that the key phrase in the committee report is that carriers and associations must within 2 years incorporate charges into their ***basic*** tariff publications. The National Council interprets the language of the committee report to mean that Congress intended to cure the problems encountered when shippers are required to consult not only the basic tariff, but also supplements. Although conversion-table supplements are considered to be an inexpensive means of updating tariffs, the National Council feels that they are apt to contain errors, require checking and their use is time consuming. Supplements represent to the National Council, a microcosm of the very problems Congress sought to correct in passing the legislation. The National Council concurs in Chairman O'Neal's dissent to the NPRO.

20. *The National Industrial Traffic League* (the League) supports the proposed regulations, including the use of conversion-table supplements as an interim step in the tariff updating process. It is the League's position that the statute and accompanying legislative history do not contain any specific prohibition against the use of conversion-table supplements. The League contends that conversion-table supplements are as much a part of the basic tariff as any other supplement. Therefore, such supplements are in conformity with the statutory requirement that increased rates "be incorporated into" the basic rate tariffs.

21. *National Oats Company, Inc.*, advocates the withdrawal of special permission No. 71-5875 in view of the adequate time allotted by the 2-year period for incorporating tariff rate increases or charges into individual or rate association tariffs.

22. *The North Dakota Public Service Commission*, an agency which regulates intrastate rates and practices of railroads serving North Dakota, opposes the use of increase tables. As an alternative, it proposes that cumulative indices of charges in the tariffs be published in each fourth supplement during the 2-year life of the ex parte master tariffs.

23. *Phillips Petroleum Company* (Phillips) generally supports the proposition that the railroads should be required to amend, revise, or update their tariff publications, subject to reasonable terms and conditions, to reflect general changes, such as nationwide increases in rates and charges. It cites examples of the progress which has been made by the major rate bureaus in updating rail tariffs and concludes that improvement is needed in this area.

The 2-year time limitation imposed by the statute for incorporation is considered to be quite liberal by Phillips. It hopes that the Commission will grant extensions of time to carriers only under extraordinary circumstances. It feels that a lenient attitude in this respect will only serve to frustrate the updating requirement.

It is Phillips' position that the regulations promulgated under this proceeding will obviate the need for conversion-table supplements which have been utilized by the railroads to incorporate general increases into a single publication. Therefore, it submits that after a reasonable period of time has elapsed, the Commission should serve notice on the railroads that special permission No. 71-5875, authorizing the railroads to file conversion-table supplements with the Commission, has served its purpose and is being canceled..

24. *The Pillsbury Company* (Pillsbury) supports the tariff updating program mandated by section 209 of the 4R Act and the regulations proposed by the Commission. The 2-year time limitation prescribed by the statute appears to be more than adequate for compliance by the carriers, according to Pillsbury. It suggests that paragraph (e) of the proposed rules, providing for an extension of the time period in which the transfer of the master tariffs into the basic tariffs must be accomplished, should be stricken or, in the alternative, that in granting extensions, such relief be afforded sparingly in order to prevent the exception from developing into the regular process.

Pillsbury supports the use of conversion-table supplements and the continuation of special permission No. 71-5875. As a caveat, however, it urges the Commission to retain the power and right to deny requests for special permission to file conversion-table supplements when the performance by the carriers or their agencies would circumvent tariff circular rules or would result in unclear and unnecessarily complex tariffs.

Examples are cited by Pillsbury of several antiquated rail tariffs. It urges the Commission to require rail carriers to maintain their total tariffs in an updated manner including reissuance of those tariffs that have out-lived their usefulness because of successive supplementation.

25. *The Railroads* find the proposed regulations to be generally consistent with the congressional intent of the statute. However, they recommend that certain changes be adopted by the Commission as amendments to the proposed rules.

The railroads begin their statement with a recital of the progress which the railroads have made (as confirmed in Commission decisions) in transferring general increases into basic tariffs.

By territory, the railroads assess the additional money and manpower which will be required in order for the railroads to comply with the time periods and methods contemplated by the proposed regulations. In each instance, the projections indicate that substantial additional expenditures will be necessary.

The first change suggested by the railroads is the addition of a term to the definition section. According to the railroads, the word "transfer" is one of the most important terms in the paragraph on general application and its meaning is considered critical to application of the entire section. Therefore, they recommend that transfer be defined to specify the methods by which incorporation into the basic tariffs may be accomplished. The proposed definition, as drafted by the railroads, is to be added to paragraph (b) and appears as follows:

> (3) The term "transfer," as used in this section, refers to: (i) reissue of basic tariffs; (ii) issue of supplements bringing up all rates and charges without regard to the

> limitations on pages and supplements contained in 49 C.F.R. §1300.9(e); (iii) issue of supplements complying with 49 C.F.R. §1300.9(e) to bring forward only such rates and charges still subject to Master tariffs; (iv) issue of conversion-table supplements as provided in Special Permission No. 71-5875, except that the six-month period referred to in the second indented subparagraph of the first ordering paragraph of Amendment 7 shall be changed to 2 years, consistent with other provisions herein; and (v) such other procedures as the Commission may authorize by special permission or otherwise.

Subsection (iv) dealing with conversion-table supplements would extend the current 6-month limitation placed on special permission No. 71-5875 to 2 years. According to the railroads, the current expiration period severely restricts the usefulness of conversion tables which provide the means for updating tariffs in less than the 2-year period. The argument proceeds that the 6-month limitation is far more restrictive than the period which Congress contemplated for updating in section 209 and is, therefore, inconsistent with the spirit of the act. Subsection (v) allows for future innovations in tariff updating.

The second suggested amendment relates to that portion of paragraph (e) of the proposed regulations which states that an extension of the time period provided under paragraph (d) is not contemplated. The railroads argue that this statement is in direct conflict with the statutory language which provides that the Commission may, upon good cause shown, extend such period of time. They contend that the regulations should be no more restrictive than the statute itself and should recognize that extensions of time may be granted for good cause shown. An example cited by the railroads of when an extension will be necessary is the case of the eastern carriers who have succeeded to the burden of updating long-neglected tariffs from the bankrupt predecessor companies. The following paragraph is suggested for substitution:

> (e) *Extension of time period.* Extension of the time period under paragraph (d) of this section for transfer of general increases from master tariffs to other tariffs will be granted only upon good cause shown. Should the filing of a petition requesting authority to extend the time period become necessary, such petition must be filed with the Commission at least 30 days before the time period is due to expire.

This proposed amendment shortens the period in which to file for an extension to 30 days. The rationale advanced by the railroads for this change is that it is impossible to determine whether the printers will be able to produce the documents more than 30 days in advance, which is the most frequent cause of failure by the railroads to meet deadlines for issuing new tariffs or supplements.

26. ***The Salt Institute,*** an organization of salt producing companies, argues that in the case of a commodity like salt, where transportation costs are of a critical nature, special consideration should be made to limit the use of conversion-table supplements, and master increase tariffs to a period not to exceed 3 months following the Commission's final order in the ex parte increase proceeding. Furthermore, the period authorized in special permission No. 71-5875 for updating tariffs should be limited so that rail rates on salt can be determined without reference to several master increase tariffs.

27. ***Southern Hardwood Traffic Association and Southeastern Lumber Manufacturers Association*** cite examples of various tariffs to show they are currently

unreasonable. According to the Southern Hardwood Traffic Association, it is more practical to reissue commodity columns to include ex parte increases than to publish conversion tables like the ones currently in use. Conversion-table supplements, if issued promptly and on an interim basis, could be of assistance. It submits that the shipping public is entitled to more up-to-date tariffs of rates or charges or in the alternative, a price list. Some reservation is expressed concerning the 2-year time period. In a given 2-year period, two or more general increases may be granted. Motor carriers are almost always able to update their tariffs to include increases so that not more than one increase supplement will be in effect during the life of a tariff. There is no reason why the railroads cannot do a better job without passing on the costs to tariff users per se. In all probability, conversion tables have been developed by the major railroads for major commodity groups for use in their day-to-day functions. These tables could be used by tariff publishing officers to accomplish the task of incorporating ex parte increases into supplements or reissues of tariffs. Southern Hardwood Traffic Association urges the Commission to be cautious in granting extensions of time under paragraph (e).

28. *Wisconsin Paper and Pulp Manufacturers' Traffic Association* cites quarterly reports and other Commission records to show that enough is not being done to simplify tariffs. In contrast, the motor carrier bureaus issue blanket supplements containing the general increases. As a general rule, within one month, the rate tariffs have either been supplemented or reissued to include the increase. The Association supports a requirement that any authorized rate increase must be incorporated into rate tariffs before the Commission will entertain a petition for another general rate increase.

REPLY STATEMENTS

1. *The North Dakota Public Service Commission*, in reply to the initial statement of the railroads, takes issue with the progress the railroads have allegedly made in tariff updating. Examples cited in support of this point are Trans-Continental Freight Bureau Tariff 45-N, I.C.C. 1850 and Trans-Continental Freight Bureau Tariff 29-0, I.C.C. 1805. The North Dakota Public Service Commission urges the Commission not to allow the carriers so many tariff circular rule waivers or sixth section relief in the future.

2. *Penick & Ford, Limited*, in reply to the initial statement of the railroads, maintains that if the amendments proffered by the railroads to paragraph (b) are adopted, the result will be continuation of the status quo. If conversion tables are allowed in the future they should be severely limited in duration and be so defined in the rules so as not to be considered as permanent transfers of rates into the basic tariffs. The statute clearly provides a 2-year period in which to update tariffs and it was not the intent of Congress to allow stop-gap measures to be employed. As for the suggested amendment to paragraph (e), Penick & Ford recommends that these extensions be severely limited by requiring exceptionally extraordinary circumstances.

In regard to the remaining railroad allegations, Penick & Ford asserts that the additional money and manpower expected to be incurred by the railroads will be offset by the reduced number of undercharge and overcharge claims resulting from implementation of the proposed rules.

3. *Garvey, Inc.*, reasserts its previous position, as set forth in its initial statement, that increase supplements should not be considered as major vehicles in transferring general increases. In reply to the railroads' initial statement, Garvey submits that the railroads have presented no evidence or covincing argument in support of its position.

4. *The Railroads,* in reply, address the major issues raised in the initial statements submitted in this proceeding.

In support of conversion-table supplements, the railroads argue that almost every basic rate tariff has one or more supplements due to the frequency of which rates are changed, added to or canceled. This process occurs without regard to general rate increases and every tariff user is accustomed to referring to supplements. A conversion table, the argument proceeds, is just another supplement to the basic tariff. Its use is consistent with the long recognized procedure for determining applicable rates through reference to supplemental matter. The widespread acceptance of conversion tables was confirmed by the Commission's permanent authorization of their use in updating motor carrier tariffs. See *Regulations, Construction, Filing, and Posting of Tariffs,* 352 I.C.C. 46, 255-259 (1976). Conversion tables are a convenient and expeditious device and are much faster than tariff updating because they are computerized. Conversion tables further expedite publication because printing is accomplished by reproduction of a computer printout, rather than by setting type for individual pages. Conversion tables provide a means for updating many tariffs in less than 2 years. The use of conversion tables makes the 2-year requirement more realistic and lessens the likelihood that extensions will be needed. The railroads allege that conversion tables have been used sparingly and cite statistics showing the number of conversion tables currently in effect in each of the basic territories. The result is that only 7 percent of the railroads' basic rate tariffs are supplemented by conversion tables. In regard to the argument that use of conversion tables is contrary to the intent of Congress in enacting the statute, the railroads point out that an earlier bill before the Senate Committee on Commerce contained a far more restrictive provision than section 209 which would probably have precluded the use of conversion tables. The railroads agree with the National Industrial Traffic League's position on conversion-table supplements. The language of section 209 is that general rate increases shall be incorporated into the individual tariffs of railroads or bureaus within 2 years. A conversion-table supplement is a supplement to an individual tariff and, as such, is as much a part of that tariff as any other supplementary matter.

In reply to the arguments concerning prohibiting the use of the predominant article theory, the railroads maintain that this area is unrelated to the publication of master tariffs and is, thus, outside the scope of this proceeding. According to the railroads, the predominant article theory never comes into play except when an updated tariff is published. This is done on statutory notice and, in case of conversion tables, on 45-days' notice. Such publications are subject to protest, suspension, and investigation and any arguments concerning the predominant article theory should be raised when the tariff item is republished.

In response to the proposal to limit the number of general rate increases as a sanction to enforce tariff updating, the railroads dismiss this argument as specious. According to the railroads, this measure would ignore the railroads' revenue needs until some arbitrary number of master tariffs were eliminated. In the railroads' estimation, this is a distortion of the national transportation policy and the stated purpose of the 4R Act, since the maintenance of adequate transportation service is obviously a far more critical matter than how many master tariffs are in effect. Section 209 does not contemplate limiting the number of general increases and the statute provides a compelling enough basis for prompt incorporation of general increases.

In analyzing the provision in the statute, which allows extensions of time based upon good cause shown, the railroads divide the comments into those parties which would have the Commission ignore its responsibility to exercise its discretion and those which would have the Commission prejudge whether good cause has been shown. Reiterating its position as presented in its initial statement, the railroads contend that paragraph (e) of the proposed regulations is an unfair prejudgement of whether good cause has been shown and directly conflicts with the language of the statute. Rather, extensions of time should be permitted on a case-by-case basis after consideration of whether the carrier or bureau has presented a sufficient showing of good cause.

The railroads respond to a particular proposal presented by General Mills in its initial statement which would establish a system of updating tariffs offering shippers alternative methods of paying rates. The railroads contend that this proposal is proscribed by section 6(7) of the act which provides that a carrier may not charge any rate other than that which is published in accordance with the statute and Commission regulations pursuant thereto.

The remainder of the railroads' reply statement responds specifically to individual complaints about the updating of specific individual tariffs.

5. ***The Pillsbury Company***, in reply to the initial statement of the railroads, questions the self-serving statements made by the railroads concerning their tariff updating program. This is particularly true in light of the inconsistent allegations that the 2-year requirement is an inadequate period of time within which to complete the tariff updating process. The Pillsbury Company submits that acceptance of the proposed changes proffered by the railroads, which would extend the current 6-month period alloted for updating conversion-table supplements to 2 years from the time the rates go into effect and would reduce the time required for notification by the carriers of their inability to complete the updating, from 90 to 30 days, would have an adverse impact on the shipping public. Accordingly, the originally announced time schedules should be upheld. The Pillsbury Company supports the conversion-table method of tariff updating as a compromise measure in the updating program. However, it objects to the changes in the time schedules presented by the railroads in their initial statement.

6. ***The National Industrial Traffic League*** (the League) replies to the amendments proposed by the railroads in their initial statement.

The League opposes the railroads' proposed section 1300.32(b)(3)(iv) which would modify the present requirement for updating existing conversion-table supplements by extending the time period to 2 years. Although supportive of conversion-table supplements in their initial statement, the League had also noted that it viewed such supplements as an interim step in the process of updating basic tariffs. It is the League's opinion that the railroads' proposal would defeat the usefulness of conversion tables, since the tariffs would become burdened with multiple conversion-table supplements issued to include subsequent general increases within the 2-year period. Moreover, the proposal would destroy the interim nature of these supplements.

The League also opposes the modification of proposed section 1300.32(e) *Extension of time period*, proffered by the railroads which would delete the phrase "is not contemplated" and substitute, therefore, "will be granted only upon good cause shown." The railroads also propose to shorten the period of time in which the carriers must notify the Commission of their request for an extension from 90 days to 30 days. The League argues that the section, as proposed by the Commission, is in conformity with the intent of Congress as reflected in the legislative history which states that any extension of time under this section should be only granted in extraordinary circumstances.

The League supports those parties seeking to prohibit the use of the predominant article theory in updating rate items by the railroads. According to the League, use of this technique in updating tariffs is unlawful and publication pursuant to the theory would be a violation of Commission orders authorizing the general increases. Thus, it would render such publications *pro tanto* unlawful.

7. *The Board of Trade of the city of Chicago,* in reply to the initial statement of the railroads, reiterates its position as set forth in its initial statement, that the 2-year time limitation is more than adequate for complying with the statutory provisions. It characterizes the suggested changes proffered by the railroads as nothing more than an attempt to obtain additional time. The Board of Trade supports the use of conversion-table supplements on an interim basis, but contends that this method of tariff updating cannot be construed as being in compliance with the law. It, therefore, urges the Commission to reject the railroads' suggested changes and to adopt the proposed regulations as set forth in the NPRO.

APPENDIX D

Adopted regulations

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER D - TARIFF AND SCHEDULES
PART 1300 - FREIGHT TARIFFS; RAILROADS, WATER CARRIERS, AND PIPELINE COMPANIES SUBJECT TO SECTION 6 OF THE INTERSTATE COMMERCE ACT AND CARRIERS JOINTLY THEREWITH

§ 1300.32 is added and reads as follows:

§ 1300.32 TRANSFER OF RAILROAD GENERAL INCREASES FROM MASTER TARIFFS

(a) *General application.*

The regulations in this section govern the transfer of railroad general increases from master tariffs into basic tariffs as required by section 6(6) of the act, as amended February 5, 1976.

(b) *Definitions.*

(1) The term "general increase," as used in this section, refers to increases in railroad rates and charges published and filed in accordance with procedures set forth in part 1102 of this chapter;

(2) The term "master tariff," as used in this section, refers to a separate tariff providing for a general increase in rates and charges which form of publication is authorized by the Commission.

(c) *General increases must be transferred.*

A general increase published by means of a master tariff must be transferred into the basic tariffs referring thereto within the time period provided under paragraph (d) of this section.

(d) *Time period for transfer of general increases.*

(1) A general increase shall be transferred from a master tariff to the basic tariffs: (i) within 2 years from the effective date of the master tariff if the Commission authorizes the general increase to become effective without suspension or investigation; or (ii) if the increase is suspended or an investigation is instituted within 2 years from the date of service of the Commission's final order authorizing the increase in whole or in part;

(2) If a general increase is under investigation by the Commission at the time a later general increase becomes effective, the date for compliance with paragraph (d)(1) of this section shall be determined by reference to date of service of the Commission's final order relating to the prior increase. Thus, the date determined under paragraph (d)(1) for transfer of the prior increase shall also govern transfer of the later increase.

(e) *Extension of time period.*

Extension of the time period provided under paragraph (d) of this section for transfer of general increases from master tariffs to other tariffs is not contemplated. Should the filing of a petition requesting authority to extend the time period become necessary, such petition must be filed with the Commission at least 90 days before the time period is due to expire.

A copy of the petition shall be simultaneously mailed by first-class mail to each party of record in the general rate increase proceeding for which the extension is being requested and that fact shall be evidenced by a certificate of service filed with the petition. A copy of the petition shall be furnished to any interested person upon request. Any reply shall be filed with the Commission promptly after the petition is filed, but in no case more than 20 days after the filing of the petition.

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER D - TARIFF AND SCHEDULES
PART 1300 - FREIGHT TARIFFS; RAILROADS, WATER CARRIERS, AND PIPELINE COMPANIES SUBJECT TO SECTION 6 OF THE INTERSTATE COMMERCE ACT AND CARRIERS JOINTLY THEREWITH

(EX PARTE NO. 326)

REGULATIONS GOVERNING THE TRANSFER OF GENERAL INCREASES FROM MASTER TARIFFS INTO THE INDIVIDUAL TARIFFS OF RAILROADS OR RAIL RATEMAKING ORGANIZATIONS

AGENCY: Interstate Commerce Commission
ACTION: Final Rule

SUMMARY: The Interstate Commerce Commission has amended its Tariff Circular No. 20 by the addition of new regulations governing the transfer of general increases from master tariffs into the individual tariffs of railroads or rail ratemaking organizations. Revised regulations were necessary to conform Commission procedure to section 209 of the Railroad Revitalization and Regulatory Reform Act of 1976, which sets statutory time limits within which all rates must be incorporated into individual tariffs. The amendments to the tariff circular were changed, in part, from those proposed in the Notice of Proposed Rulemaking and Order (41 F.R. 28799) in response to comments submitted by interested parties.

DATES: The effective date of the prescribed rules is

FOR FURTHER INFORMATION CONTACT:

Janice M. Rosenak, Deputy Director
Section of Rates, or
Harvey Gobetz, Assistant Deputy Director
Section of Rates,
Office of Proceedings
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-7693 or 275-7656

SUPPLEMENTARY INFORMATION:

The Commission has issued a report and order in Ex Parte No. 326, *Regulations Governing the Transfer of General Increases from Master Tariffs into the Individual Tariffs of Railroads or Rail Ratemaking Organizations*. The report and order served December 19, 1977, discusses issues raised by interested parties in this rulemaking proceeding. In response to these comments, paragraph (e) of the proposed regulations was amended by the addition of a paragraph providing for notification of parties in the event a petition for extension of the time period is filed for the transfer of general increases from master tariffs to other tariffs. In addition, paragraph (d)(1)(i) was amended to correct a typographical omission in the proposed rules.

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER D - TARIFF AND SCHEDULES
PART 1300 - FREIGHT TARIFFS; RAILROADS, WATER CARRIERS, AND PIPELINE COMPANIES SUBJECT TO SECTION 6 OF THE INTERSTATE COMMERCE ACT AND CARRIERS JOINTLY THEREWITH

ORDER

EX PARTE NO. 326

REGULATIONS GOVERNING THE TRANSFER OF GENERAL INCREASES FROM MASTER TARIFFS INTO THE INDIVIDUAL TARIFFS OF RAILROADS OR RAIL RATEMAKING ORGANIZATIONS

On July 13, 1976, the Commission published a Notice of Proposed Rulemaking and Order in the Federal Register (41 F.R. 28799) setting forth proposed regulations governing the transfer of general increases from master tariffs into the individual tariffs of railroads or rail ratemaking organizations.

After due consideration of the comments submitted by the parties in this proceeding, the proposed regulations were amended, in part, by the addition of a paragraph providing for notification of parties in the event a petition for extension of the time period is filed. The Commission has filed its report adopting the proposed regulations, as amended, which report is made a part of this order.

It is ordered:

Chapter X of Title 49, Part 1300.32 of the Code of Federal Regulations is amended, as set forth in appendix D of the report. This order shall become effective on December 28, 1977, and shall remain in effect until modified or revoked, in whole or in part, by further order of the Commission. Notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

EX PARTE NO. 55 (SUB-NO. 24)

REVISED RULES OF PRACTICE

Decided April 28, 1977

Upon investigation and consideration of views, arguments, and representations of the parties, existing rules of practice revised in certain respects, and certain additional rules prescribed. Appropriate order entered.

The list of appearances below supplements the list of appearances as indicated in the interim report in this proceeding.

Nelson J. Cooney, Robert L. James, William F. King, Todd A. Peterman, and *Edward G. Villalon* for motor carriers and interested motor carrier associations.

Andrew P. Goldstein, Arthur R. Littleton, Harold E. Spencer, and *Anthony C. Vance* for other interested parties and pro se.

Robert A. Anthony for the Administrative Conference of the United States.

REPORT OF THE COMMISSION

BY THE COMMISSION:

The Commission, pursuant to a recommendation by its Blue Ribbon Staff Panel in 1975, began an evaluation of its Rules of Practice with the aim of updating, clarifying, and improving them. Subsequently, the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law No. 94-210, 90 Stat. 31, charged the Commission with a duty to review and revise its Rules of Practice in the rail area within 1 year of the date of enactment. Pursuant to its commitment resulting from the Blue Ribbon Panel's recommendation and its statutory duty, certain proposed revised Rules of Practice were compiled which were designed to clarify and simplify our existing rules and make more efficient the procedures employed in proceedings before the Commission arising under the Interstate Commerce Act and related acts. Such rules were set forth in a Notice of Proposed Rulemaking published November 8, 1976, and written comments from interested members of the general public were invited.

After investigation and consideration of the views, arguments, and representations of the parties, the Commission, by interim report and order of March 1, 1977, reached tentative conclusions regarding the rules of practice and proposed certain additional rules. Written comments on the interim report were invited.

All references to rules in this report are to the rules as numbered in the interim report. The adopted rules have been renumbered, and a cross-reference table is set forth in the attached rules following the table of contents. The summary of representations and the discussion and conclusions regarding the rules which appeared in the interim report, except as modified and supplemented herein, are hereby incorporated. Arguments raised in the new comments which have been adequately discussed in the interim report will not be further discussed. The comments to the interim report are summarized below.

REPRESENTATIONS

All parties of record are listed in the appendix hereto.

American Trucking Associations, Inc. (ATA).—ATA states its opinion that the rules, as interpreted in the interim report, permit parties to appear in all proceedings before the Commission in the dual capacity of advocate and witness. It asks that the final report further clarify that dual capacity is not limited to instances in which financial hardship must first be proved.

Pilot Freight Carriers, Inc. (Pilot).—Pilot also seeks clarification that dual capacity is permitted in all proceedings before the Commission and that it will not be limited to instances in which financial hardship must be shown.

The Board of Trade of Kansas City, Missouri, Inc. (Board).—As to rule 103, the Board asserts that there is no provision for an appeal in rail proceedings on the basis of general transportation importance and that one should be added. It states that rule 102(h) should indicate that the title page and certificate of service page do not count in the three-page limitation. The Board requests that a section be added to rule 71, indicating that dual capacity is permitted in proceedings before the Commission. As to rule 42, it states that section (d) requires the filing of an original and six copies of protests and that the rule should additionally provide that petitions thereunder be sent to the Suspension Board. The Board also asks for recommendation of its comments discussed in the interim report regarding rules 88, 98, and 103.

Anthony C. Vance.—As to rule 102, Mr. Vance argues that the 30-page limitation on exceptions and the 10-page limitation on petitions for reconsideration are unrealistic and overlook or ignore the complexity of many Commission proceedings. This attorney suggests the limitations be increased to 50 pages on exceptions and 30 pages on petitions for reconsideration. Mr. Vance also states his belief that permitting parties to appear in a dual capacity is inadvisable, but that if the Commission is going to so permit, it should be restricted to small parties of limited means.

Joseph G. Dail, Jr.—As to rule 102, Mr. Dail states that the 30-page limitation on exceptions and petitions for reconsideration of employee board decisions and replies thereto is unsound, inconsistent with procedural fairness, and should not be adopted. He argues that such limitations fail properly to consider the complexity of many proceedings and will effectively deprive parties in such proceedings of the reasonable opportunity to submit exceptions and supporting reasons as provided in the Administrative Procedure Act.

Babcock, Paschall, and Paylor.—They believe that the provision of rule 4(b) which accepts a pleading as timely filed if mailed by certified or registered mail, postmarked at least 3 days prior to the due date, is not beneficial and is possibly counterproductive. These attorneys suggest that if a proviso of this nature is retained, it should include documents sent by express mail and first-class mail, postmarked or certified by the attorney or practitioner as having been mailed at least 3 days prior to the due date. Babcock, Paschall, and Paylor suggest that rule 22(a) also refer to certififed or registered mail. As to rules 22, 21(a), 23(b), 51, and 103(c), they object to the time limitations and ask that 3-day extensions for mailing be inserted. These attorneys would like the Commission to indicate that frivolous motions to strike under rule 15 will not be entertained. As to rule 21(c), Babcock, Paschall, and Paylor believe an exception for extraordinary circumstances should be added and that service of requests for postponements should be permitted by first-class mail in all instances. They believe a reference to the effective date of a protested tariff or schedule should be required by rule 42(a). These attorneys assert that rule 42(g) should provide that a protest against revisions to rail rates and charges should be, rather than include, a verified complaint and that the prayer of such complaint should be limited to a request that the protested matter be suspended and investigated.

Babcock, Paschall, and Paylor believe that "and complainant's statement" has been erroneously omitted from rule 49(a), and they seek a clarification that this rule does not impose specific format requirements. As to rule 51, these attorneys state that "an argument" should be inserted in the two places where the word "evidence" appears. As to rule 60(b), Babcock, Paschall, and Paylor argue that personal delivery of depositions to the Commission should be allowed. They believe that rules 62(a) and 63(a) should indicate only one copy of interrogatories and requests for admissions need be filed with the Commission. These attorneys also would like to know whether, and how many, copies of answers to interrogatories and requests for admissions must be filed. As to rule 62(b), Babcock, Paschall, and Paylor ask that the protection of priviledged or proprietary information contained in computer runs, punch cards, or tapes be extended to such information contained in any records. As to rule 70, they believe that bench decisions should not be permitted in any rate or finance proceeding and they state that they are unsure whether the authority to assign an initial decision to parties for preparation is appropriate. As to rule 73, these attorneys object to allowing persons to participate in, and become parties to, proceedings involving rates without filing a petition for leave to intervene. They suggest that it might be useful for rule 74 to specify that the party presenting witnesses schedule their order. As to rule 88, these attorneys want to restrict the use of oral argument in lieu of briefs to those instances where all parties agree thereto. As to rule 91(d), Babcock, Paschall, and Paylor ask that the Commission state positively whether an abstract of evidence may be contained in an appendix or other document separate from a brief. As to rules 102 and 103, they suggest that findings of fact or law not made be specifically stated as a ground for appeal and they object to the page limitations of rules 103(b)(3) and 103(e).

National Small Shipments Traffic Conference, Inc. (NSSTC), Drug and Toilet Preparation Traffic Conference (DTPTC).—As to rules 102(i) and 103(g), NSSTC and DTPTC argue that the prohibition against replies to petitions for stay severely affects the substantive rights of shippers and shipper organizations by tilting the rules of practice in favor of regulated carriers and against the interest of the shipping public. They argue that such provisions violate the Administrative Procedure Act.

MidWest Packers Traffic Association (MPTA).—MPTA suggests that 49 CFR 1131.2(d), *Temporary Authority Application—Filing of*

Application, be amended to add the following: "(5) In those cases involving a single trip only, the appropriate Bureau of Motor Carriers field staff member may grant emergency temporary authority by telephone before any supporting documentation is received and without any verification of the absence of existing carriers' service when verbally advised by supporting shipper representative of the following: (a) The names and addresses of the shipper and carrier and the identity of the shipper representative making the representation; (b) that a load must be moved immediately and that no existing carrier can or will provide equipment to move said load; (c) the specific origin(s) and destination(s) and the scheduled or estimated time for arrival at the final unloading point; (d) that the rate to be paid for such load is no lower than existing established rates on like commodities between the points involved; and (e) that the shipper is aware of the provisions of 18 U.S.C. 1001. Telegraphic confirmation of the data will be sent to the I.C.C. field offices by the shipper. In such situations, the proper documentation must follow the grant and must be sent to the appropriate Bureau of Motor Carrier field office with a shipper certification that contains the following language: "I hereby acknowledge that knowing and willful misstatements or omissions of material facts constitute federal violations punishable by up to five years in prison and fines up to $10,000 for each offense. See: 18 U.S.C. 1001." MPTA also seeks to add to 49 CFR 1131.2. Section (12) as follows: "(12) The information contained herein shall be considered *prima facie* true and correct."

Harold E. Spencer.—This attorney feels that rule 4(b) discriminates against practitioners outside Washington, D.C., by permitting parties to file pleadings on the Commission in person and simultaneously serving parties of record by mail. He further argues that the rule as amended in the interim report aggravates the problem because certified or registered mail is expensive in personnel time, the 3-day presumption period can be met by regular mail, and the amendment implies that late pleadings sent by regular mail will not be accepted. Mr. Spencer suggests that service of documents should be considered accomplished on mailing as shown by the certificate of service. This attorney also attaches for consideration a copy of a speech given by him concerning the 4R Act and the rules as proposed prior to the interim report.

Brown Transport, Corp. (Brown).—As to dual capacity, Brown suggests that the Commission clarify that all parties may appear in such capacity in all proceedings before the Commission. In order to reach this result, it suggests that rule 71 be amended as follows: "*Appearances; standard of conduct; absence from hearing.* (a) *Who may appear.* Any individual may appear for himself and any member of a partnership which is a party to any proceeding may appear for such partnership upon adequate identification. A bona fide officer or a full-time employee of a corporation, association, or of an individual may appear for such corporation, association, or individual. A party also may be represented by a practitioner. In cases of appearance by an officer or full-time employee, such representations shall include the right to appear in a dual capacity, i.e., representing his company as both advocate and to give testimony in behalf of that company."

National Motor Freight Traffic Association, Inc. (NMFTA).—As to rules 62(c) and 63(c), NMFTA opposes the requirement that interrogatories and requests for admissions must be served at least 20 days prior to the date assigned for the filing of Opening Statements of Fact and Argument. It asserts that such restrictions effectively deny discovery in many cases handled under modified procedure because of the similar time period under rule 51. NMFTA suggests that this problem could be cured by adjusting the time limitations of rules 62(a) and 63(a), 62(c) and 63(c), or 51.

The National Industrial Traffic League (NITL).—NITL questions whether the rules as finally adopted in this proceeding which are not applicable to rail proceedings will be subject to congressional review and urges that all rules have the same effective date. As to dual capacity, it suggests that attorneys be excluded to prevent a conflict with the ethical standards of bar associations. As to rule 103(f), NITL feels that "administratively final" should be changed to "effective" in order to conform with section 303 of the 4R Act.

Association of American Railroads (AAR).—AAR states that rule 23(b) refers to rules 101 and 102 when it should refer to rules 102 and 103. It requests that the Commission parenthetically note that rule 40 does not establish procedures for abandonment or merger proceedings. As to rule 73, AAR objects to participation without intervention in rate proceedings. It believes that there is no justification for limiting the grounds on appeal under rule 103(b) to those enumerated in rule 103(e). AAR would also like this rule to require a vote by the Commission to avoid the need for an initial decision, to provide a 30-day time period for filing administrative appeals, and to relax page length restrictions. As to rule 105, it asks that the Commission define the events upon which the statutory time limits begin to run.

Andrew P. Goldstein.—As to rule 35, Mr. Goldstein requests that an answer to a formal complaint be made mandatory. He objects to the requirement of rule 42 that a protest to a railroad tariff or schedule published under "short notice" must be filed not less than 5 days prior to the effective date of the schedule. This attorney asks that rule 45 be amended to require a party including a cost or other special study in evidence submitted under the modified procedure to make the underlying working papers for such study available. As to rule 62, Mr. Goldstein suggests that written interrogatories be permitted to be served less than 20 days prior to the date assigned for the commencement of a hearing or for the filing of opening modified procedure statements in proceedings under section 15(8) of the Interstate Commerce Act, provided they are served in sufficient time for answers to be filed 15 days before the date on which the party serving the interrogatories is required to present its own evidence. He suggests that the words "in the opinion of the presiding officer" in rule 87 be removed. As to rule 88, this attorney requests that the provision allowing a hearing officer to require oral argument in lieu of written briefs be made inapplicable to section 15(8) proceedings and that it either be circumscribed or made subject to clear "policy guidelines" in other circumstances. Mr. Goldstein asks that the page limitations in rule 103 on appeals be deferred, not applied where oral argument has been ordered in lieu of briefs, or be made subject to a specified procedure for waiver. As to rule 225, he suggests that a "substantial user" test could be developed with respect to Special Permission Applications in order to provide notice to users. At the very least, Mr. Goldstein feels that this rule should firmly fix in the Board's procedures a mechanism whereby any party requesting notification of a Special Permission Application and an opportunity to be heard with respect thereto given that notice and that opportunity.

The Assocation of Interstate Commerce Commission Practitioners (AICCP).—As to dual capacity, AICCP wants the right to so appear formulated in a specific rule. Toward this end, it suggests that rule 71(a) be amended by striking the words "by permission of the officer presiding at hearing," placing a period after the word "individual" and adding "In case of an appearance by an officer or full-time employee, such appearances shall include the right to appear in a dual capacity, that is, representing his company both as an advocate with all rights inherent in that capacity and as a witness to give testimony in behalf of his employer."

Common Carrier Conference-Irregular Route of the American Trucking Associations (CCC).—CCC would like a statement in the final report that an appearance in a dual capacity may be made by any full-time employee under any and all circumstances.

Motor Carrier Lawyer's Association Committee on Legal Ethics, Unauthorized Practice of Law and Grievances (Committee).—The Committee feels that the Commission is permitting dual capacity appearances by full-time employees and thus discriminating against the attorneys who cannot so appear. It suggests that dual capacity only be permitted where a full-time employee makes an affirmative showing that his failure to so appear will result in substantial hardship.

Administrative Conference of the United States (ACUS).—ACUS feels that rule 5(g) should indicate the criteria that the Commission uses in determining what types of cases are heard by what types of officers. It also asks whether the terms there listed have a different meaning in other parts of the rules and why "proceeding" in rules 5(b) is changed to "referred matter" in rule 5(g). It also feels that the phrase "thereon pursuant to provision of law" is awkward and unnecessary and that "officer" should be changed to "presiding officer." As to rule 95, it suggests that "officer's" be stricken from (b), and that either "exceptions" or "appeals" be used for all appeals or that the distinction between the two be stated. ACUS queries as to when an initial decision by an officer other than a Commissioner, Administrative Law Judge, or joint board becomes the effective decision of the Commission. It suggests that section 17(9)(b) of the Interstate Commerce Act is clear and concise and could be the basis for rule 95. As to rule 103, it feels section (a) would be more properly placed in rule 95 or, alternatively, made a separate rule and that the parameters for voiding the requirement for initial decisions should be set. As to rule 103(b)(1), it suggests that "any party may appeal from" be substituted for "may file an appeal to." ACUS questions the meaning of "report or order" in this section, whether there are initial decisions other than those issued in the first instance, and whether initial decisions can be voided after they are made. It states that rule 103(c) contains the phrase "initial decision, report or order" and that the time for filing of an appeal is measured from the date of service of an initial decision. It asks to what bodies are appeals taken. ACUS questions whether the review described in rule 103(c) is different from an administrative appeal. It seeks clarification of the status of appellate decisions of employee boards and suggests that rule 103(c) could be reentitled "Discretionary

Review of Final Decisions." ACUS objects to the limited grounds in this section for appeal of initial decisions rendered by the division or Commission in the first instance. It suggests that the definition of and penalties for engaging in ex parte communications be set out in rule 4(e) and that the rule apply once a proceeding is noticed in the first instance. ACUS also recommends that the definition of one who intercedes be expanded to one who volunteers a communication that may be expected to influence the determination of the proceeding. It suggests that rule 45 be amended as follows: "The Commission may, in its discretion, order that a proceeding be heard under modified procedure if it appears that substantially all important issues of material fact may be resolved by means of written materials and that the efficient disposition of the proceeding can be made without oral hearing." ACUS feels rule 47 should provide that the pleadings of interveners should conform with the general requirements of the rules governing all pleadings for modified procedure. It suggests that an introductory paragraph be added to rules 24 and 25 to explain how the informal complaint procedures operate and for what they are used. ACUS feels that rules 24 and 28 obviate the need for lengthy requirements in other rules as to the material that must be included in the pleadings of various types of cases. It feels rule 43 should define "investigation." ACUS would prefer that rule 70 state that the officer has the duty and authority to control the procedure in the matter referred to him and for this rule to precede rule 68. It believes that the purpose and function of rule 73 are unclear and that it verges on the unintelligable. ACUS asks that the requirements of participation without intervention be set out in a manner that makes them clearer and easier to use. It feels that rule 75 should clearly indicate that the less stringent standard applicable to administrative agencies generally governs the admissibility of evidence and not the rules applicable to Federal courts sitting without a jury. ACUS would like the heading of rule 87 to indicate that it includes grounds for interlocutory appeals.

DISCUSSION AND CONCLUSIONS

For purposes of discussion, the material will be divided into the following categories: (1) Time and page limitations; (2) Dual capacity; (3) Protests against tariffs or schedules; (4) Discovery procedures; (5) Administrative appeals; (6) Modified procedure; (7) Officer's initial decision; and (8) Other rules. As in the interim report, the necessarily inexact nature of these categories may result in a particular rule being discussed more than once.

(1) *Time and Page Limitations*

(a) *Time limitations.*—Several attorneys contend that the proviso in rule 4(b) accepting a pleading as timely filed if mailed by certified or registered mail postmarked at least 3 days prior to the due date, is not beneficial and is possibly even counterproductive. They criticize the proviso for failing to address the problem that non-Washington lawyers and practitioners have due to time lost in receiving and delivering documents, which significantly reduces the time permitted for preparation of documents. For example, it is pointed out by one party that it is common for Washington attorneys and practitioners to deliver documents to the Commission on the due date and to mail them to the parties of record on the same date. One attorney-practitioner objects to the proviso on the grounds that it could be interpreted to require an attorney or practitioner to send documents by certified or registered mail or run the risk of nonacceptance. He also notes that many attorneys and practitioners would be unable to afford the cost in terms of personnel time.

If the proviso in rule 4(b) is retained, certain parties propose that it be revised to provide that a document mailed by first class or express mail, postmarked (or certified by the attorney or practitioner to have been mailed) at least 3 days prior to the due date will be accepted as timely filed. They also ask the Commission to reconsider its refusal to extend the time periods for filing pleadings. Another party feels that the date of mailing, as shown by the certificate of service, ought to be deemed the date of filing.

As noted in the interim report, the date of receipt at the Commission was originally selected as the determinative date for filing pleadings in the belief that it affords the greatest degree of certainty and additionally serves most effectively to reduce regulatory delay within the Commission. After giving careful consideration to the possible alternatives, we determined in the interim report to retain the rule. However, one modification in the form of a proviso was added to help alleviate the problems encountered by the mail service. While we are aware that no rule is able to eliminate all of the problems, we feel that the rule as proposed is most effective in reducing regulatory lag while also affording parties some means of protecting themselves against the vicissitudes of the mail service. Such proviso will, however, be amended to include express mail in the exception applicable to certified or registered mail.

Due to the new procedures introduced by the 4R Act, we are not able to amend further rule 4(b). The Act has placed severe time constraints on the Commission, which prevent it from being able to extend by even 1 day the time period for filing pleadings. Unfortunately, the burden of the time limitations affects not only the Commission, but also the attorneys and practitioners practicing before it, some to a greater degree than others. We regret this circumstance, but note that exceptions will be made in cases where the Commission is persuaded that extraordinary circumstances exist.

In addition to rule 4(b), an objection is raised by AAR with respect to the proposed 20-day period for filing administrative appeals in rail proceedings established by rule 103(c). They feel that the 4R Act, amending section 17(9)(b) of the ICA, authorizes the Commission to retain the original 30-day period for filing. We, however, interpret that section of the 4R Act to require appeals to be filed within 20 days, while permitting the Commission or division, on a case-by-case basis, to authorize the extension of that period by a further period not to exceed 20 days. Incorporating in the General Rules of Practice a 30-day period for filing all administrative appeals would be contrary to both the intent and the language of the 4R Act.

(b) *Page limitations.*—Objections are raised by numerous parties that the page limitations set forth in rules 102 and 103 are unrealistic, fail properly to consider the complexity of many proceedings, and will effectively deprive parties in such proceedings of the reasonable opportunity to submit exceptions and supporting reasons, therefor, provided by the Administrative Procedure Act.

One attorney suggests that as to rule 103, a determination as to page limitations on appeals be deferred until the impact of the 4R Act on the Commission's workload is properly assessed. Alternatively, he suggests that if the page limitations on appeals are retained, they ought not apply where oral argument in lieu of briefs is ordered and they ought not be applied so as to give an advantage to parties on one side who simply outnumber those on the other. Additionally, that party asks that rule 103 be revised to include a procedure for waiving the page limitation.

Another party proposes that as to rule 102, the 30-page limitation on exceptions and the 10-page limitation on petitions for reconsideration should be increased to 50 and 30 pages, respectively.

In arriving at the proposed page limitations, the Commission has spent considerable time and effort, taking into account all relevant factors, including the accelerated time frames imposed on it by the 4R Act. In light of these factors, the page limitations proposed are the maximum considered workable. If, in the future, these limitations prove unworkable, consideration will be given to an appropriate modification of the rule. In the interim, the proposed rules applicable to page limitations will remain unchanged. While we feel that inclusion in the rule of a provision for relief from the page limitations upon a showing of extraordinary circumstances would only serve to encourage such requests and to add to the regulatory lag, we will continue to give due consideration to such requests.

(2) *Dual capacity.*—The interim report apparently failed to clarify sufficiently the Commission's position regarding appearances by a party in a proceeding as both advocate and witness. Most of the parties commenting are in favor of dual capacity appearances in all proceedings before the Commission. However, they are concerned that the interim report might be interpreted as restricting such appearances to those situations were the client is a small party of limited means. Three parties request that rule 71 be amended specifically to permit dual capacity appearances.

NITL suggests that attorneys not be permitted to appear in dual capacity to prevent a conflict with the ethical standards of bar associations. MCLA feels that allowing full-time employees to appear in a dual capacity will effectively discriminate against attorneys who will be barred from so appearing by the Canons of Ethics of bar associations. It suggests that dual capacity be permitted only where a full-time employee mades an affirmative showing that his failure to appear in such capacity will result in substantial hardship. Mr. Vance feels that dual capacity is undesirable but if it is permitted at all, it should be limited to instances where financial hardship is proved.

It is the intention of the Commission to permit all parties practicing before it to appear in a dual capacity. There will be no limitation to situations where to do otherwise would result in financial hardship. Such dual capacity appearances will enable parties to present their evidence in an efficient and economical manner. The distinctive nature of both administrative proceedings before the Commission and internal structure of members of the transportation industry make the use of a full-time employee as an advocate and witness advisable.

Many of the practitioners before the Commission are intimately involved on a daily basis with the inner workings and problems of the clients they represent. This involvement results in an expertise which enhances the practitioner's competence as an advocate and makes him a well-informed witness. We conclude that the Code of Ethics for Practitioners before the Interstate Commerce Commission does not bar any practitioner before the Commission from appearing in a dual capacity. We do not feel that a specific rule permitting dual capacity is necessary or appropriate in light of the discussion herein and of the fact that this is more properly an interpretation of our Code of Ethics.

(3) *Protests against tariffs or schedules; special permission applications.*—One party points out a discrepancy between the number of copies of a protest required to be filed according to rule 42(d) and according to appendix F of the proposed rules. Appendix F will be corrected to reflect the fact that the original and six copies of a protest must be filed. That party also requests that rule 42 be amended to reflect a recent change by the Commission to the effect that petitions filed under this rule be sent directly to the Suspension Board to expedite handling. Presently, protests are filed with the Secretary of the Commission, as are other pleadings. In order to avoid confusion and to provide for uniformity, protests will continue to be filed with the Commission. However, a provision will be added requiring that in filing protests, mailings should be directed to the attention of the Suspension and Fourth Section Board.

It is suggested in another comment that rule 42(a) ought to require a reference to the effective date of the protested tariff or schedule. The proposed rule requires reference to the tariff or schedule as well as to the item or particular provision protested. Therefore, upon examination of the protested matter, the effective date of the tariff or schedule would be self evident. Nevertheless, reference to the effective date would be useful for purposes of determining whether the protest was timely filed since the effective date is the reference point from which the time for filing a protest begins to run. The rule will be revised to require such information.

Certain attorneys state that in order to be consistent with section 15(8)(d) of the Interstate Commerce Act (ICA), as amended by the 4R Act, rule 42(g) should provide that a protest against revisions to rail rates and charges should *be* (rather than include) a verified complaint. Apparently these attorneys are equating the term complaint in section 15(8)(a) of the ICA with the term protest in rule 42(g). Carrying this interpretation over to section 15(8)(d), they conclude that the entire protest in rule 42(g) must be verified. We, however, feel that this is not the interpretation intended. Instead, we interpret section 15(8)(d) of the ICA to require verification of only those facts specified in sections 15(8)(d) (i) and (ii) of the ICA. Accordingly, rule 42(g) properly requires that a protest merely *include* (rather than be) a verified complaint. Other general allegations contained in a protest filed under rule 42(g), therefore, need not be verified.

It is also requested that rule 42(g) be amended to provide that the prayer of the verified complaint should be limited to a request that the protested matter be suspended and investigated. Regardless of what relief is requested, the only relief which will be granted is suspension or investigation. Accordingly, the proposed amendment is unnecessary.

Attorney-practitioner Goldstein objects to rule 42 on the grounds that where a tariff or schedule is published on "short notice" of 5 days or less, the provision requiring a protest to be filed not less than 5 days prior to the effective date of the tariff or schedule precludes any party from effectively protesting such schedule. That party additionally argues that although the rule does provide for use of telegraphic protests in emergency situations, practically speaking, such protests can neither be verified as required in rule 42(g), nor can they serve as the vehicle for transmitting evidence relating to market dominance, where such evidence is required.

Theoretically, rule 42 could be applied in such a manner as to preclude a party from being able to file an effective protest. In reality, however, rarely is a tariff or schedule permitted to be published on notice shorter than 10 days. When publication on 5 or fewer days is permitted, the matter is consistently one in which no protests are anticipated. However, should an emergency situation arise, it will be dealt with on a case-by-case basis.

Mr. Goldstein is also critical of the absence in the General Rules of Practice of any requirement that either notice of an application to publish on "short notice" or notice of the disposition of such application, be given to the shipping public or to shippers known to have an interest in the schedules. He proposes that rule 225, relating to the Special Permission Board, be amended to provide notice to interested parties when a special permission application to publish on "short notice" is about to be filed. He suggests that a "substantial user" test be developed to determine which parties are the users of the tariff or, in other words, the interested parties. He also advocates the addition of a provision to rule 225 requiring notification of the parties of record of the action taken by the Special Permission Board.

The suggestion that notice be given to interested parties when a special permission application to publish on "short notice" is about to be filed is unacceptable since the Commission has no way of knowing beforehand when such application is about to be filed. However, the proposal to require notification to interested parties to the action of the disposition of the application is valid and will be implemented.

(4) *Discovery.*—Babcock, Paschall, and Paylor ask that rule 60 permit personal delivery of depositions to the Commission. Personal delivery is a recognized method of service of other pleadings and no good reason appears for not permitting it on depositions. Therefore, rule 60(d) will be amended accordingly.

The same parties suggest that rules 62(a) and 63(a) should indicate that only one copy of interrogatories and requests for admissions need be filed with the Commission. We feel this is unnecessary since such information is contained in appendix F. They ask whether, and how many, copies of answers to interrogatories and requests for admissions must be filed. The rules are unclear on this point and will be changed to provide for service of one copy of such documents on the Commission.

NMFTA opposes the time requirements on the service of interrogatories and requests for admissions on the ground that they effectively deny discovery in some modified procedure cases. Mr. Goldstein suggests that the Commission permit service of such documents less than 20 days prior to the commencement of oral hearing or the filing of opening statements on modified procedure, provided they are served in sufficient time for answers to be filed 15 days before the date on which the party serving the document is required to present its own evidence.

These arguments overlook the fact that a party need not wait until the order setting the proceeding for oral hearing or modified procedure is served before commencing discovery. The time limits presently provided in these rules are designed to lend certainty as to when documents must be served and to foster the expeditious use of discovery methods. The suggested changes would be less effective in meeting these ends and, therefore, will not be adopted.

(5) *Administrative appeals.*—One party complains that proposed rule 103 contains no provision for a finding of general transportation importance (GTI). We direct their attention to section (e)(1)(i) of

that rule. That party also suggests the 3-page limitation on GTI petitions in rule 102(h) be clarified specifically to exclude the title page and certificate of service page. We accept this suggestion and will incorporate it in the final rule.

Several attorneys note that it was stated in the interim report that it is reasonable to infer that exceptions in rule 102 and appeals in rule 103 can be based on findings of fact or law not made below. They, however, feel it is necessary to spell this out in the rules. Therefore, the rules will be modified to clarify such situations.

The comment of one party correctly points out that in rule 103(f)(3) the words "administratively final" should be changed to "effective" in order to conform with section 303(a) of the 4R Act. This change will be made.

It is argued by two parties that there is no justification for limiting the grounds for petitions for administrative review in rail proceedings to those enumerated in rule 103(e)(l)(i). In fact, section 303(a) of the 4R Act, amending section 17(9)(d) of the ICA requires that grounds be narrowed to those specified in the proposed rule.

AAR suggests that rule 103(a) be amended to reflect the fact that the Commission or division must specifically vote to void the requirement for an initial decision. They propose that this amendment be made in such a manner as to notify all interested parties of the action being taken. Inclusion of a provision requiring a specific vote would be superfluous since all actions of either the Commission or a division, by their very nature, require a vote. A provision for notification of the parties is, however, appropriate and will be included.

With respect to proposed rule 103(a), ACUS contends that this provision would be more appropriately placed in rule 95; alternatively, it could be made a separate rule. We agree with the latter suggestion and will make this provision a separate rule. That party also recommends that rule 103(a) be revised to establish parameters (criteria) regarding the manner in which the discretion of the Commission will be exercised in voiding the requirement of an initial decision. Such revision is unnecessary since the rule presently specifies the circumstances under which such discretion may be exercised.

As recommended, rule 103(b)(l) will be amended to read, "Any party may appeal from ***" rather than, "Any party may file an appeal to ***." In that same section, ACUS points out that the appeal lies from an "initial decision, report, or order." It questions in what respect an initial decision differs from a report or order. We conclude that the language "report or order" is superfluous and it shall be stricken from sections (a), (b), and (c) of rule 103.

Rule 103(b)(1) will also be amended to reflect the fact that one appeal as a matter of right lies to any decision issued in the first instance unless such appeal is precluded by the time constraints of the 4R Act. For example, section 17(9)(i) of the ICA, as amended by the 4R Act, provides that the stricter time limits of section 15(8) of the ICA apply to investigation and suspension proceedings. Such time limits may foreclose the opportunity to consider and act on an appeal.

We additionally recognize the need, as pointed out by ACUS, to amend rule 103(c) in order to provide that appeals, including petitions for administrative review, must be filed within 20 days after service of the decision being reviewed, rather than 20 days after service of the initial decision. That rule will be amended accordingly.

Criticism is also expressed that the proposed rules fail to indicate to what body an appeal is taken. According to section 303(a) of the 4R Act, an appeal may be filed "with the Commission." As that section amends section 17(9)(c) of the ICA, it provides that the Commission or a division shall decide such appeals. However, it also gives the Commission discretion to authorize employee boards to decide appeals under certain circumstances. Since the determination as to what body decides such appeals must be made on a case-by-case basis and also because no such provision is set forth with regard to exceptions in nonrail proceedings, we determine that inclusion of such provision in the rail-related rules is unwarranted.

ACUS points out that the proposed rules are unclear in distinguishing administrative appeal from administrative review. A provision defining administrative appeal will be added at the beginning of rule 103 to remedy this situation.

It is also argued with respect to rule 103 that clarification of the effect and the manner of review of decisions of employee boards is necessary. It is accurately pointed out that section 303(a) of the 4R Act gives the Commission discretion to substitute employee boards for the division or Commission and to authorize them to act in an appellate capacity under certain circumstances. Nevertheless, in formulating the General Rules of Practice it was envisioned that in rail proceedings, employee boards would exercise no appellate jurisdiction. In accordance with this intent, the proposed rules provide that, in rail proceedings, appellate jurisdiction will always be exercised by either the Commission or a division thereof. Rule 103(a), for example, provides that where the necessity of an initial decision is voided, the matter shall be considered by the division or Commission. No mention is made of an employee board.

ACUS correctly concludes from the fact that a division may be assigned matters for initial disposition, that the procedure contemplated for the review of these decisions is the same as for any other initial disposition. As previously indicated, except where the time constraints of the 4R Act preclude it, any party may appeal from any decision issued in the first instance. Even where the requirement of an initial decision has been voided, the decision issued in the first instance by the division or Commission · is appealable under rule 103(b)(1). Rule 103(b)(1), as noted above, will be amended to reflect this. Additionally, the first sentence of section (e)(1)(iii) will be deleted since the page limitations on appeals from decisions rendered by the division or Commission in the first instance is properly the subject matter of section (b)(3) of that rule.

(6) *Modified procedure.*—One attorney requests that rule 45 be amended to require a party which includes a cost or other special study in evidence under modified procedure to make available the underlying working papers for such study. This type of provision is not within the purview of rule 45 which deals with how the modified procedure is initiated. The discovery procedures of these rules are designed to allow parties to gain this type of information. It is, therefore, felt that no amendment of the nature here suggested is warranted. Another party suggests that rule 45 be amended to allow the Commission to order modified procedure only in proceedings where it appears that substantially all important issues of material fact may be resolved by means of written materials and that the efficient disposition of the proceeding can be made without oral hearing. Such a provision will be helpful and will be incorporated in the adopted rules.

ACUS feels that rule 47 should provide that pleadings of interveners conform with the general requirements of pleadings under modified procedure rather than to the provisions relating to the parties in whose behalf they intervene. We agree with this modification which recognizes the fact that parties sometimes intervene on their own behalf in situations where no party of record shares their interest.

Certain attorneys ask that the Commission clarify that rule 49(a) does not impose specific format requirements and they point out that this section erroneously omits the words "and complainant's statement." We agree that the provisions of this section address themselves to substance rather than form. Also, the phrase "and complainant's statement" was unintentionally left out and will be replaced.

Babcock, Paschall, and Paylor feel that "and arguments" should be inserted in rule 51 after "evidence." We do not feel that such an addition is advisable, in that it might lead parties to believe that a more stringent limitation on reply argument is being instituted.

(7) *Officer's initial decision.*—One party questions whether anyone other than an officer can issue an initial decision and, if not, criticizes the use of the phrase "officer's initial decision" in rule 95. That party points out that according to rule 103(e)(l)(iii) it appears that an initial decision can be rendered by the Commission under certain circumstances. That party proposes that the word "officer" be stricken from both rules 95(a) and 5(h) and that any special status of any initial decision prepared by the Commission be clearly defined. We concede that rule 103(e)(l)(iii) is misleading. The word "initial" will be stricken from that section in order to correct the misapprehension that the Commission renders initial decisions, when in actuality a decision rendered by the entire Commission is a final decision even though it is the first decision in a proceeding. We will also delete the word "officer" in both rules 95 and 5(h) for purposes of clarification.

With respect to rule 95(b), it is suggested that if the only distinction between exceptions and appeals is that the former are filed in nonrail proceedings and the latter are filed in rail proceedings, then uniform terminology should be used. The term "appeal," however, was specifically used in order to comport with the language used in section 303(a) of the 4R Act and will remain unchanged.

An explanation is requested by ACUS for the omission from rule 95(b) of any discussion of when, if ever, an initial decision of a division or an employee board becomes the effective decision of the Commission. That party states that with respect to the question of when initial decisions become effective, section 303(a) of the 4R Act which amends section 17(9)(b) of the ICA, is clear and concise and could be used as the basis for rule 95(b). Alternatively, it suggests that rule 103(c) could be incorporated into rule 95(b).

We agree that rule 95(b) must be amended to indicate when the decision of one other than a Commissioner, an Administrative Law Judge, or a joint board becomes effective. However, the suggestions of adopting section 303(a) of the 4R Act or incorporating rule 103(c) into rule 95(b) are not sufficient since those provisions apply only to rail proceedings. Appropriate changes will, nevertheless, be made so as to clarify at what point a decision issued by a Commissioner, an Administrative Law Judge, or a joint board in any proceeding will become effective as the order of the Commission.

(8) *Other rules.*—ACUS suggests changes in rule 4(e) which, in its opinion, would expand the definition of one who intercedes and change the time from which the prohibition starts to apply. It also would place more information in the text of the rule instead of referring to appendix C. Rule 4(e) has worked very well in its present form for quite some time. The definitions and penalities are well understood by parties practicing before the Commission and we believe the recommended changes would create confusion without any concommitant benefit.

As to rule 5(g), this party requests that an indication be made as to what types of cases are heard by what types of officers, suggests that "thereon pursuant to provision of law" is awkward and unnecessary, asks why "proceeding" is changed to "referred matter," and recommends that "officer" be changed to "presiding officer." The assignment of a proceeding to a particular type of officer is done on a case-by-case basis in order to insure the most efficient manner of disposition. To list all the applicable criteria in reaching the determination of assignment would be nearly impossible and probably misleading. We agree that "thereon pursuant to provision of law" is unnecessary and it will be deleted as will the terminology "referred matter" which also is unnecessary. The term "officer" avoids excessive verbiage and will not be changed.

Certain attorneys request that the Commission indicate that frivolous motions to strike under rule 15 will not be entertained. Any frivolous motion is violative of rule 4(d) and will not be entertained.

As to rule 21(c), they ask that service of requests for postponements on parties be permitted by other than first-class mail, regardless of the method of communication to the Commission. We feel that adopting this suggested change would be unfair to other parties in a proceeding in that it could adversely affect their ability to respond to such requests. We do agree, however, with their contention that rule 22(a) should permit service by certified and registered mail and by express.

AAR points out that rule 23(b) refers to the wrong rules regarding administrative appeals. This oversight will be corrected herein by the requisite renumbering of all the rules.

ACUS suggests that an introductory paragraph be added to rules 24 and 25 to explain how and in what instances informal complaints are used. We believe the present rules indicate the method in which informal complaints are used. The Commission employs the informal complaint procedures as a vehicle to respond to the large amount of correspondences alleging violations which fail to meet the more stringent requirements of the formal complaint procedures. Such correspondence is commonly sent by parties of limited means who are not familiar with Commission procedures. Often, the complained of matter is described without any citation of specific regulations or sections of the act. We do not feel that an introductory paragraph of the nature suggested is warranted. This party also feels that rules 24 and 28 obviate the need for lengthy requirements in other rules as to the material that must be included in the pleadings of various types of cases. Additional requirements are only indicated in other rules where the specific circumstances require.

Mr. Goldstein requests that rule 35 require an answer to a formal complaint. He argues that such procedure is followed in judicial practice. Thus, in a judicial proceeding, the failure of a defendant specifically to deny an allegation is treated as an admission. In a formal complaint proceeding before the Commission, the failure to deny merely joins the issue. We feel that the present rule is fairest to defendants of limited means. Such procedure has not resulted in problems.

ACUS feels that rule 43 should define investigation. We do not agree in that it is a commonly used term, not subject to varied interpretations and does not hold any different meaning in Commission proceedings.

Babcock, Paschall, and Paylor ask that rule 70 be amended to prohibit the use of a bench decision in any finance or rate proceeding, and they state that they are unsure as to whether the grant of authority in this rule which allows the favored party to prepare an initial decision is appropriate. The use of bench decisions can be of great value in expediting simple rate and finance proceedings. We feel that the sound judicial discretion of the officer is a sufficient check on the abuse of the use of bench decisions. We feel that the preparation of an initial decision by a party is appropriate. Such a practice is common in many courts and can result in substantial time savings. ACUS feels that rule 70 should precede rule 68 and that rule 70 should state that the officer has the duty and authority to control the procedure in the manner referred to him. We agree that rule 70 should precede rule 68 but we feel the present wording of rule 70 more accurately states the authority granted therein than does the proposed amendment.

Certain attorneys and AAR object to the provisions of rule 73 which allow persons to participate in rate proceedings without filing a petition for leave to intervene. This procedure is intended to allow small parties of limited means an opportunity to participate in proceedings which may have a substantial impact on them. Rate proceedings have the potential for such impact on small parties and will not be excluded from the provisions of this rule. ACUS feels that the purpose and function of this rule are unclear and that the rule itself is virtually unintelligible. We agree that this rule is complicated but this complication is necessary to delineate properly the limited proceedings in which participation without intervention will be allowed.

Babcock, Paschall, and Paylor suggest that it might be useful for rule 74 to specify that the party presenting witnesses may schedule their order of appearance. We do not feel that this matter is of such importance as to require inclusion in this rule and could improperly appear as an incursion on the authority of the officer at the hearing.

ACUS would like rule 75 to indicate clearly that a less stringent standard applicable to administrative agencies generally governs the admissibility of evidence and not the rules applicable to Federal courts sitting without a jury. We agree that the rule should indicate that evidence which will support a decision under the Administrative Procedure Act should be admissible in proceedings before the Commission and an appropriate amendment will be added.

This party would also like rule 87 to indicate in its title that it includes the ground for interlocutory appeals. We believe the present title more accurately describes the content of the rule. Interlocutory appeals are necessarily objections to rulings of an officer at hearing. However, the rule also informs a party of the procedures to be followed when an interlocutory appeal is not appropriate. Mr. Goldstein asks that "in the opinion of the presiding officer" be removed from rule 86. These words are found in the section of the rule which generally permits interlocutory appeals when for some reason, the ruling might, in the opinion of the presiding officer, result in substantial irreparable harm. The discretion of the hearing officer is an essential restraint on this broad provision. Otherwise, any ruling could be the subject of an interlocutory appeal which, of course, would delay proceedings, often for no good reason, and be an inordinate burden on the limited resources of the Commission.

This attorney requests that rule 88 be amended to preclude an officer from requiring oral argument in lieu of briefs in section 15(a) proceedings and that, in other proceedings, this power be circumscribed or made subject to clear policy guidelines. We do not believe that any type of proceeding before the Commission is, in all instances, inappropriate for the use of oral argument in lieu of briefs. We, likewise, feel that the sound judicial discretion of the officer is a sufficient check on the abuse of this procedure.

Certain attorneys ask whether rule 91(d) prohibits an abstract of evidence from appearing in an appendix or other document separate from a brief. It does not. However, this rule does intend to discourage the routine filing of an abstract where one is unnecessary. The former language could reasonably be interpreted as requiring an abstract in a brief in all instances.

Likewise, rules 57 and 247 were amended in ***Revision of Application Forms***, 125 M.C.C. 790 (1976). These rules will appear in this report as amended by the ***Revision*** proceeding.

Further consideration of proposed rule 107 leads us to believe that the 60-day time period we have imposed on ourselves for the disposition of pleadings in rail matters is insufficient. The wide variety of matters which fall within the purview of "pleadings" warrants an increase of this time period to 120 days. Such a time frame will continue to be compatible with the statutory requirements of the 4R Act and, therefore, will be adopted herein.

One other matter requires discussion. NITL questions whether the rules, as finally adopted in this proceeding and which are not applicable to rail proceedings, will be subject to congressional review and urges that all rules have the same effective date. All the rules will be submitted to Congress, although it has limited its jurisdiction to those applicable to rail proceedings. It is intended that all the rules will have the same effective date.

FINDINGS

We find that Part 1100 of Chapter X of Title 49 of the Code of Federal Regulations should be revised as set forth in the attached notice; that such rules are just and reasonable, otherwise lawful, and to the extent set forth in this report are consistent with the national transportation policy; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER MURPHY, concurring in part, dissenting in part:

I am in general agreement with the majority except to the extent that it adopts rule 4(b) with the addition of a 3-day period for the filing of pleadings by certified, registered, or express mail. If there be an actual need to provide some relief, then a uniform period applicable to all persons should be added to the specific rules. The proposal can work to the serious detriment of the small consumer or practitioner and to the preference of large, well represented interests. Additionally, the proposal will undoubtedly add to the Commission's workload by requiring the separate, special handling of all pleadings sought to be submitted under the 3-day extension criteria. Finally, provision for the 3-day extension fails to reflect that while Commission regulations may be waived or modified, statutory directives may not be altered. For example, such statutory provisions as section 16(3)(b), 49 U.S.C. 16(3)(b), among others, which are akin to a statute of limitations, effectively deprive this Commission of jurisdiction in a complaint for reparation filed with the Commission after a specified period. Filed with the Commission means filed, not mailed. If relief therefrom is thought to be appropriate, then legislative action should be initiated.

Accordingly, to the extent that the majority's decision differs from the views expressed above, I respectfully dissent therefrom.

COMMISSIONER GRESHAM, whom COMMISSIONER HARDIN joins, concurring except with regard to the revision of rule 4(b).

APPENDIX

Representatives

I. CARRIER LEGAL REPRESENTATIVES

Harry N. Babcock, James R. Paschall, and John J. Paylor
Butler, Snow, O'Mara, Stevens, and Cannada
J. Raymond Clark
John T. Coon
Joseph G. Dail, Jr.

I. CARRIER LEGAL REPRESENTATIVES—Continued

Andrew P. Goldstein
Harper, Young, and Smith
Heim, Koldin, and Canter
LeBoeuf, Lamb, Leiby, and McRae
Richard J. Lee
Gordon P. MacDougall
MacLeay, Lynch, Bernhard, and Gregg
Thomas F. McGrath
Robinson, Felts, Starnes, and Nations
Smart and Bartsch
Harold E. Spencer
Paul F. Sullivan
James H. Sweeney
Anthony C. Vance
White and Southwell

II. ASSOCIATION OF CARRIER LEGAL REPRESENTATIVES

Association of Interstate Commerce Commission Practitioners
Motor Carrier Lawyers Association and its Committee on Legal Ethics, Unauthorized Practice of Law, and Grievances

III. CARRIERS AND CARRIER ASSOCIATIONS

American Trucking Associations, Inc., and its Common Carrier Conference-Irregular Route
Association of American Railroads
Brown Transport Corp.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Cooper Motor Lines, Inc.
Pilot Freight Carriers, Inc.
Sea-Land Service, Inc.
Southern Motor Carriers Rate Conference, Inc.
Transportation Association of America

IV. GOVERNMENTAL INTERESTS

Administrative Conference of the United States
State of Mexico, State Corporation Commission
U.S. Department of Defense, Office of the Judge Advocate General, Department of the Army
U.S. Department of Health, Education, and Welfare, Office of Consumer Affairs
U.S. Department of Transportation, Federal Highway Administration

V. SHIPPING INTERESTS

Board of Trade of Kansas City, Missouri, Inc.
Champion International Corporation
Grain Processing Corporation
National Industrial Traffic League

V. SHIPPING INTERESTS—Continued

National Motor Freight Traffic Association, Inc.
National Small Shipment Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference
Midwest Packers Traffic Association

VI. OTHER INTERESTS

Railway Labor Executivies' Association, and Brotherhood of Railway and Airline Clerks

ORDER

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - PRACTICE AND PROCEDURE
PART 1100 - RULES OF PRACTICE

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 28th day of April 1977.

EX PARTE NO. 55 (SUB-NO. 24)

REVISED RULES OF PRACTICE

It appearing, That by Notice of Proposed Rulemaking and Order published November 8, 1976, this Commission instituted a rulemaking proceeding for the purpose of revising the Interstate Commerce Commission's General Rules of Practice in order to facilitate and expedite proceedings before it.

It further appearing, That the Commission, by interim report and order of March 1, 1977, reached tentative conclusions regarding existing rules and proposed certain additional rules.

And it further appearing, That revision of the rules involved in this proceeding has been completed and that the Commission has made and filed its report herein which report and the said interim report are hereby referred to and made a part thereof;

It is ordered, That part 1100 of Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended as set forth in the attached Notice of Adopted Amended Rules; and that said notice be, and is hereby, adopted and is incorporated by reference into this order.

And it is further ordered, That this order shall become effective July 1, 1977, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - PRACTICE AND PROCEDURE

[Ex Parte No. 55 (Sub-No. 24)]

PART 1100—RULES OF PRACTICE

AGENCY: Interstate Commerce Commission
ACTION: Final rule.

SUMMARY: These rules revise the existing rules of practice and prescribe certain additional rules. The rules are intended to clarify, simplify and update the existing rules and to facilitate and expedite the proceedings before the Commission.

EFFECTIVE DATE: July 1, 1977.
FOR FURTHER INFORMATION CONTACT:

Janice M. Rosenak (Rates)
(202-275-7693)

Philip Israel (Finance)
(202-275-7245)

Michael Erenberg (Operating Rights)
(202-275-7292)

Interstate Commerce Commission
Washington, D.C. 20423

SUPPLEMENTARY INFORMATION: The rules, as revised, make substantial changes in the procedures regarding discovery, administrative appeals, and argument at the end of oral hearings.

Notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Interstate Commerce Commission at Washington, D.C., and by filing a copy of the attached notice with the Director, Office of the Federal Register.

These rules are issued under the authority of Title 49—Chapters 1, 8, 12, and 13, U.S. Code and 5 U.S.C. 553 and 559.

Issued at Washington, D.C.

Accordingly, the following amended rules of practice (49 CFR 1100), have been modified and adopted.

SUBCHAPTER B—PRACTICE AND PROCEDURE

Sec.
1100.1 General information. (Rule 1)
1100.2 Liberal construction. (Rule 2)
1100.3 Information; special instructions. (Rule 3)

SUBCHAPTER B—PRACTICE AND PROCEDURE—Continued

Sec.
1100.4 Communications and pleadings generally. (Rule 4)
1100.5 Definitions. (Rule 5)
1100.6 Use of gender and number. (Rule 6)

PRACTITIONERS

1100.7 Register of practitioners. (Rule 7)
1100.8 Attorneys at Law - Qualifications and requirements for practice before the Commission. (Rule 8)
1100.9 Persons not attorneys at law—qualifications and requirements for practice before the Commission. (Rule 9)
1100.10 Initial appearances. (Rule 10)
1100.11 Suspension, disbarment, or other disciplinary action. (Rule 11)

SPECIAL RULES RESPECTING JOINT BOARDS

1100.12 Joint board organization and procedures. (Rule 12)

PLEADING SPECIFICATIONS GENERALLY

1100.13 Typographical specifications generally. (Rule 13)
1100.14 Copies. (Rule 14)
1100.15 Attestation and verification. (Rule 15)
1100.16 Affirmation in lieu of oath. (Rule 16)
1100.17 Pleadings part of record. (Rule 17)
1100.18 Amendments. (Rule 18)
1100.19 Time. (Rule 19)
1100.20 Service of pleadings and papers. (Rule 20)
1100.21 Replies and motions. (Rule 21)

COMMENCEMENT OF PROCEEDINGS

1100.22 Informal complaints not seeking damages. (Rule 22)
1100.23 Informal complaints seeking damages. (Rule 23)
1100.24 Formal complaints; copies. (Rule 24)
1100.25 Formal complaints; joinder. (Rule 25)
1100.26 Formal complaints; allegations generally. (Rule 26)
1100.27 Formal complaints; when damages sought. (Rule 27)
1100.28 Formal complaints; discrimination, preference, and prejudice. (Rule 28)
1100.29 Formal complaints; other specifications. (Rule 29)
1100.30 Formal complaints; prayers for relief. (Rule 30)
1100.31 Amended and supplemental formal complaints. (Rule 31)
1100.32 Service of formal and cross complaints. (Rule 32)
1100.33 Answers and cross complaints to formal complaints. (Rule 33)
1100.34 Motions to dismiss or to make more definite and certain. (Rule 34)
1100.35 Satisfaction of complaint. (Rule 35)
1100.36 Applications—Forms and instructions. (Rule 36)
1100.37 Applications; notice. (Rule 37)
1100.38 Protests against applications. (Rule 38)

COMMENCEMENT OF PROCEEDINGS—Continued

Sec.
1100.39 Protests in valuation proceedings. (Rule 39)
1100.40 Protests against tariffs or schedules. (Rule 40)
1100.41 Service of investigation order; default where failure to comply. (Rule 41)

PETITIONS SEEKING INSTITUTION OF RULEMAKING PROCEEDINGS

1100.42 Petitions seeking institution of rulemaking proceedings. (Rule 42)

MODIFIED PROCEDURE

1100.43 Modified procedure; how initiated. (Rule 43)
1100.44 Modified procedure; effect of order. (Rule 44)
1100.45 Modified procedure; intervention. (Rule 45)
1100.46 Modified procedure; joint pleadings. (Rule 46)
1100.47 Modified procedure; content of pleadings. (Rule 47)
1100.48 Modified procedure; verification. (Rule 48)
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1100.245 Special rules governing procedures for the issuance to single-State common carriers by motor vehicle of Certificates of Registration under section 206(a)(6) of the Interstate Commerce Act, as amended October 15, 1962, authorizing motor common carrier operations in interstate and foreign commerce, and certain other procedural matters with respect thereto. (Rule 245)

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1100.249 Special rules governing the filing of motor carrier mail transportation service orders or determinations under subsection (f) of section 5203 of Title 39, United States Code, 84 Stat. 768, 39 U.S.C. 5208. (Rule 249)

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Appendix D--Attorneys-Qualifications.

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Accordingly, the following amended rules of practice (49 CFR 1100), have been modified and adopted.

§1100.1 *General information.*

(a) *Scope of rules.*—The rules in this part govern procedure before the Interstate Commerce Commission in proceedings under the Interstate Commerce Act, as amended, and related acts, except insofar as they may be inconsistent with and superseded by requirements governing the practice and procedure in specified categories of proceedings as set out in parts 1101-1159,[1] or unless otherwise directed by the Commission in any proceeding.

(b) *Applicability.*—Subpart A of this part sets forth general rules applicable to all types of proceedings, except to the extent otherwise provided in subpart B hereof which sets forth special rules applicable to particular types of proceedings. Wherever there is any conflict between one of the rules of general applicability in subpart A and a special rule in subpart B, the special rule will govern.

(c) *Reference to and citation of rules.*—This part shall be referred to as the "Rules of Practice." Each section, and any paragraph or subparagraph thereof, shall be referred to as a "Rule." The number of each rule shall include only the numbers and letters at the right of the decimal point. For example, "§1100.61 Request for admission" shall be referred to as "Rule 61." Paragraph (b) of that rule, relating to "Effect of Admission," shall be referred to as "Rule 61(b)."

§1100.2 *Liberal construction.*

The rules in this part shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented.

§1100.3 *Information; special instructions.*

Information as to procedure under the rules in this part and instructions supplementing these rules in special instances, will be furnished upon written application to the Secretary and Assistant Secretary of the Commission, Washington, D.C., 20423, or by telephone.

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[1] An index to parts 1101-1159 is set forth in appendix E hereto.

SUBPART A—RULES OF GENERAL APPLICABILITY

§1100.4 *Communications and pleadings generally.*

(a) *How addressed.*—All communications, including correspondence concerning matters referred to boards, should be addressed to the Commission unless otherwise specifically directed. All communications should clearly designate the docket number, if any, and short title. The person communicating shall state his address, the party he represents, and how response should be sent to him if not by first-class mail.

(b) *Timely filing required.*—Pleadings, requests, or other papers or documents required or permitted to be filed under this part must be received for filing at the Commission's offices at Washington, D.C., within the time limits, if any, for such filing. The date of receipt at the Commission and not the date of deposit in the mails is determinative, provided, however, that if such document is mailed by certified, registered or express mail postmarked at least 3 days prior to the due date, it will be accepted as timely filed.

(c) *Disposition of; when defective.*—In any proceeding when upon inspection the Commission is of the opinion that a pleading, document, or paper tendered for filing does not comply with this part or, if it be an application, does not sufficiently set forth required material or is otherwise insufficient, the Commission may decline to accept the pleading, document, or paper for filing and may return it unfiled, or the Commission may accept it for filing and advise the person tendering it of the deficiency and require that the deficiency be corrected.

(d) *Objectionable matter.*—The Commission may order any redundant, irrelevant, immaterial, impertinent, or scandalous matter stricken from any pleading, document, or paper filed with it.

(e) *Ex parte communications prohibited; penalties provided.*—Ex parte communications as defined in appendix C to this part are prohibited and any person violating the prohibitions set out in such appendix is subject to the penalties therein provided.

§1100.5 *Definitions.*

As used in this part:

(a) The terms "act" and "part" mean the Interstate Commerce Act and the several parts thereof, respectively. The term "act" also means, unless the context otherwise indicates, any other statute which the Commission administers in whole or in part.

NOTE: References to parts designated by Roman numerals refer to the Interstate Commerce Act. References to "this part," the rules in this part or to parts designated by Arabic numerals, refer to this code.

(b) The term "proceeding" shall include: (1) an "informal complaint" filed under rule 22 or 23 or a "formal complaint" alleging violation of any provision of the act or of any regulation or requirement made pursuant to a power granted by such act, including petitions on the special docket; (2) an "application" for (i) the granting of any right, privilege, authority, or relief under or from any provision of the act or of any regulation or requirement made pursuant to a power granted by such act, or (ii) the consideration of any submission required by law to be made to the Commission; (3) an "investigation" instituted by the Commission; and (4) a "rulemaking" proposal instituted by the Commission.

(c) The term "complainant" means a person filing a complaint; "defendant" means a person against whom complaint is filed; "applicant" means a person designated in an investigation; "protestant" means a person opposed to the granting of an application, to any tariff or schedule becoming effective, or to a tentative valuation; "intervener" means a person permitted to intervene as provided in rule 70 or 71, and "petitioner" means any other person seeking relief otherwise than by complaint, protest or application.

(d) The term "party" shall include all named in paragraph (c) above, or others, permitted or directed by the Commission to participate in a proceeding. It shall not include persons signing certifications of support or witnesses appearing at an oral hearing or submitting verified statements under modified procedure unless such persons are included in the preceding provisions of this rule, and shall not include persons named in the docket service list merely for the purpose of receiving copies of Commission releases.

(e) The term "pleading" means a complaint, answer, reply, application, protest, written comment, petition to investigate, motion (other than motion orally made at hearing or argument), brief, exceptions, petition, document supplementing oral hearing as described in rule 86 and all documents filed under modified procedure.

(f) The term "practitioner" means a person authorized by the Commission to appear before it in a representative capacity.

(g) The term "officer," except as a different meaning is indicated in rules 15(b), 55 to 65, inclusive, 69(a) and 76 (civil and corporate functionaries), includes a division, Commissioner, Administrative Law Judge, board of employees (called an "employees board" in this part), an examiner or special board composed of State representatives (called a "joint board" in this part), to which a proceeding is assigned or referred for hearing, consideration, or recommendation of an appropriate order. The term "board" means either an employee board or a joint board as the context requires.

(h) The term "initial decision" means a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record, and an appropriate order. An initial decision made by a Commissioner, an Administrative Law Judge, or a joint board will become effective as the order of the Commission in the circumstances described in rule 91(b).

(i) The term "tentative decision" means a decision proposed by the Commission, which shall embrace the same elements specified for inclusion in initial decisions. A tentative decision will not become the decision of the Commission through failure to file objections, but in the absence of exceptions or of ascertainable error the statement therein of the issues and facts ordinarily will be taken by the Commission as the basis of its subsequent decision.

(j) The term "modified procedure" means the procedure specified in rules 43 to 52, inclusive, which rules provide for the filing and serving of pleadings in proceedings with a view to limiting the matters upon which subsequent oral evidence, if any, will be introduced.

(k) The term "transcript" means a written or electronically recorded statement of all proceedings at an oral hearing.

§1100.6 *Use of gender and number.*

Words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; and words importing the masculine gender include the feminine.

PRACTITIONERS

§1100.7 *Register of practitioners.*

A register is maintained by the Commission in which are entered the names of all persons entitled to practice before the Commission. Corporations and firms will not be admitted or recognized.

§1100.8 *Attorneys at law—qualifications and requirements for practice before the Commission.*

Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth or the District of Columbia may represent others before the Commission upon filing with the Commission a written declaration so stating that he is currently qualified. The written declaration shall contain the declarant's full name, address, and telephone number. A declaration may be filed with the Secretary of the Commission in the form as shown in appendix D to this part, in which event the attorney's name will be entered in the Register of Attorneys at Law. Attorneys may also file declarations with the Secretary or a hearing officer when making an initial appearance in any proceeding and the attorney's name will be entered in the Register of Attorneys at Law. Once an attorney's name is entered in the Register of Attorneys at Law no further declaration of qualification will be required except in those instances where an attorney's right to practice has been suspended, in which event a written declaration will be required that he is now properly qualified in accordance with this paragraph.

§1100.9 *Persons not attorneys at law—qualifications and requirements for practice before the Commission.*

(a) *In general.*—Any citizen or resident of the United States, not an attorney of law, who shall file an application for admission to practice, accompanied by payment of the fee prescribed by rule or order of the Commission, successfully complete the practitioners' examination, and show that he possesses the necessary legal and technical qualifications to enable him to render valuable service before the Commission and that he is competent to advise and assist in the presentation of matters before the Commission, may be permitted to practice before the Commission.

(b) *Application for admission.*—An application filed pursuant to this rule under oath for admission to practice shall be completed in full on the form provided by the Commission, and shall be addressed to the Secretary of the Commission, Washington, D.C. 20423.

(c) *Additional certificates by applicant's sponsors; hearing on application; abandonment of application.*—The Commission may require an applicant's sponsors to provide a detailed statement of the nature and extent of their knowledge of his qualifications. Upon consideration thereof, if the Commission is not satisfied as to the adequacy of applicant's qualifications, he will be notified thereof by registered mail, whereupon he may request a hearing to prove his qualifications. If he presents such a request, the Commission will accord him a hearing. In the absence of a request for hearing within 20 days from receipt of said notice, his application shall be considered as withdrawn.

(d) *Application fee.*—Each application filed pursuant to this rule must be accompanied by a nonrefundable fee of $50. Payment must be made either in cash, or by check or money order payable to the Interstate Commerce Commission.

(e) *Failure to appear for examination.*—Except for good cause shown, if an applicant fails to appear at the time and place indicated by the Commission to take the practitioners' examination, the application shall be considered withdrawn.

(f) *Applicant's oath.*—No applicant shall be admitted to practice before the Commission until he shall have subscribed to an oath or affirmation that he will deport himself, as a practitioner before the Commission, uprightly, and according to law; and that he will support the Constitution of the United States and laws of the United States and will conform to the rules and regulations of the Commission.

§1100.10 *Initial appearances.*

Practitioners shall file a declaration that they are authorized to represent the particular party in whose behalf they propose to act at the time of making an initial appearance in any proceeding. This requirement will be met by the practitioner entering his name as the representative of an applicant in the appropriate space on an application form; by signing any complaint, petition, protest, reply, or other pleading with a designation following the practitioner's signature that he is the attorney for or other representative of a party therein named; by entering an appearance on the form provided at any hearing; or by filing a letter with the Secretary of the Commission stating that he is authorized to represent a party, whose name and address is given in a particular proceeding which shall be identified. For additional information on appearances, see rule 69.

§1100.11 *Suspension, disbarment, or other disciplinary action.*

When it is shown to the Commission that any member of its bar has been suspended or disbarred from practice in any court of record, or has violated any of the Commission's rules, including the code of ethics as set out in appendix A, or has engaged on other conduct unbecoming a member of the bar of the Commission, he will be subject to suspension, disbarment, or other disciplinary action by the Commission. The member shall be afforded an opportunity to show good cause, within such time as the Commission shall prescribe, why he should not be suspended, disbarred or otherwise disciplined. Upon his response to the order to show cause, and after hearing, if requested, or upon failure to respond within the time prescribed for a response, the Commission shall issue an appropriate order.

SPECIAL RULES RESPECTING JOINT BOARDS

§1100.12 *Joint board organization and procedures.*

(a) *Organization.*—After a joint board has been created it shall select one of its members to act as chairman for all purposes concerning matters which may be referred to it. In the event the member so selected is absent from any meeting of the joint board the members attending shall select one of such members, except as provided in paragraph (b) of this section, temporarily to act as chairman.

(b) *Waiver by absence of a joint board member.*—The failure of a duly appointed member of a joint board to participate in any hearing after notice thereof on a matter referred to such joint board shall be considered to constitute, as to the matter referred, a waiver of action on the part of the State from which such member was appointed.

(c) *Procedural rulings in case of disagreement.*—If the members of a joint board or a majority thereof in actual attendance at a hearing shall be unable to agree upon the disposition of a procedural question arising therein, the chairman (or acting chairman) of the board shall decide the question and rule or order accordingly.

(d) *From of joint board's initial decision; service.*—In the interest of uniformity the board's initial decision shall conform as nearly as may be practicable to the form of decision issued by the Commission in similar cases. The board's initial decision will be served by the Commission.

(e) *Termination of joint board jurisdiction; subsequent procedure.*—The jurisdiction of a joint board over a referred matter shall be terminated in the event of: (1) service of an initial decision as provided in paragraph (d) of this section; (2) submission of the board's conclusions without a written initial decision; (3) waiver of action in writing by appropriate authority of each State from which a member is entitled to be appointed; (4) failure of all members of the board to appear at the hearing; (5) failure of a majority of the board to agree on substantive matters; or (6) entry of order vacating the order of reference to the joint board. Except where an initial decision is served as provided in paragraph (d) of this section, in which event the subsequent procedure will be as provided in rules 101, 102, 103 and 104, a referred matter, after termination of joint board jurisdiction, will be decided by the Commission or be made the subject of another officer's initial decision on the record, theretofore, made or after such hearing or further hearing as may be required.

PLEADINGS SPECIFICATIONS GENERALLY

§1100.13 *Typographical specifications generally.*

Except as otherwise provided respecting applications (rule 36(a)), exhibits (rule 82(a)), and informal complaints (rule 22(a)), all pleadings, documents, and papers to be filed under these rules shall be on opaque, unglazed, durable paper not exceeding 8 1/2 by 11 inches. To permit binding in covers of uniform size, margins of a least 1 1/2 and 1 inch, respectively, shall be allowed on the left and right margins. Binding shall be on the left margin. Reproduction may be by printing, printing by offset press, multigraphing, or mimeographing, or by any other process, provided the copies are clear and permanently legible. Whiteline blueprints which cannot be reproduced by photography are not acceptable. If directly typewritten, or if in facsimile reproduction of typewriting, the impression may be on both sides of the paper and must be double-spaced, except that long quotations shall be single-spaced and indented. Nothing less in size than Elite type shall be used. If printed, adequate leading and nothing less than 10-point type shall be used, except that 8-point type may be employed in footnotes and in tabular matter where printing limitations so require. If a pleading or brief is in excess of 50 pages (except a pleading under modified or shortened procedure), including cover pages, indexes, and appendixes, the impression must be on both sides. Printing by offset press will be accepted: provided, that the type used is not reduced in size smaller than that required for typewritten documents. Failure to observe these specifications will result in rejection.

§1100.14 *Copies.*

The original and six copies of every pleading, document, or paper permitted or required to be filed under this part shall be furnished for use of the Commission except as a different number is otherwise specified in appendix F hereto which lists the various pleadings, documents, or papers normally filed with the Commission.

§1100.15 *Attestation and verification.*

(a) *Practitioner's signature.*—If a party is represented by a practitioner each pleading, document, or paper of such party shall be signed in ink by one such practitioner whose address shall be stated. The signature of a practitioner constitutes a certificate by him that he has read the pleading, document, or paper; that he is authorized to file it; that to the best of his knowledge, information, and belief there is good ground for it; that it is not interposed for delay; and that with respect to a complaint he files it with the distinct knowledge and specific consent of complainant. A pleading, document, or paper thus signed need not be verified or accompanied by affidavit except as otherwise provided in these rules.

(b) *When no practitioner's signature.*—A pleading, document, or paper not signed by a practitioner must be signed in ink, the address of the signer shall be stated, and the facts alleged in a pleading must be verified under oath by the person in whose behalf it is filed. Signature and verification in such manner must be by at least one complainant if the pleading is a complaint. A pleading, document, or paper filed on behalf of a corporation or other organization authorized to make complaint under the act, which is not signed by a practitioner must be signed in ink, and the facts alleged in a pleading must be verified by an executive officer of such corporation or organization.

§1100.16 *Affirmation in lieu of oath.*

Whenever under this part an oath is required, an affirmation in judicial form will be accepted in lieu thereof.

§1100.17 *Pleadings part of record.*

Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, if separately stated and verified, and unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross-examination on the evidence so included in the record. Pleadings may contain specific references to or quotation from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations, or practices alleged to be material. A filing under rule 40, protests against tariffs or schedules, shall not be considered a pleading for the purposes of this rule.

§1100.18 *Amendments.*

Leave to file amendments to any pleading will be allowed or denied as a matter of discretion.

§1100.19 *Time.*

(a) *Computation.*—In computing any period of time prescribed or allowed by this part, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is Saturday, Sunday, or a legal holiday in the District of Columbia, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a holiday. A half holiday shall not be considered as a holiday. This rule shall apply to the measurement of time forward, as well as backward from a specified date.

(b) When the date designated for filing briefs or other documents is a Saturday, Sunday, or a legal holiday in the District of Columbia, that date shall be extended to the next day which is neither a Saturday, Sunday, nor a legal holiday in the District of Columbia. A half holiday shall not be considered as a holiday.

(c) *Modification.*—Except as to the maximum time periods provided by law or specified in this part respecting informal complaints seeking damages (rule 23), any time period prescribed or permitted in this part may, upon request and for good and sufficient cause, be modified by the Commission in its discretion. Requests for extension or modifications of time must be served upon all parties of record at the same time and by the same method of communication as service is made on the Commission. A request for postponement of date for filing briefs or other documents must be filed not less than 10 days before the due date. Only the original of the request and certificate of service need be filed with the Commission. If granted, the party making the request shall promptly so notify all parties to the proceeding and so certify to the Commission.

§1100.20 *Service of pleadings and papers.*

(a) *Generally.*—Except as otherwise provided in paragraph (b) of this section, or as otherwise provided respecting applications (rule 36(b)), formal complaints (rule 32), and informal complaints (rule 22(b)), every pleading, document, or paper must, when filed, or tendered to the Commission for filing, include a certificate showing simultaneous service thereof upon all parties to the proceeding. Such service shall be made by delivery in person, or by first-class mail, certified mail, registered mail, or by express or equivalent parcel delivery service, properly addressed with charges prepaid, one copy to each party. Service upon the parties shall be by the same means of communication and class of service employed in making delivery to the Commission: provided, however, that when delivery is made to the Commission in person, and it is not feasible to serve the other parties in person, service shall be made by first-class or express mail. When any party is represented by a practitioner, service upon such practitioner will be deemed service upon the party.

(b) *Exceptions as to letter.*—Copies of letters to the Commission relating to oral argument (rule 93) and subpoenas (rule 54(a)) need not be served upon other parties to the proceeding.

§1100.21 *Replies and motions.*

(a) *Time for filing.*—Except that a reply to a reply is not permitted and except as otherwise provided in these rules, an adverse party may file and serve a reply or motion addressed to any pleading permitted under the rules in this part within 20 days after the filing of such pleading with the Commission.

(b) *Replies to administrative appeals.*—A reply to an administrative appeal filed under rules 97 and 98 seeking a change in a decision, order, or requirement may be filed and served within 20 days after the final date for filing such administrative appeals.

(c) The original of the reply or motion should be accompanied by the same number of copies as required respecting the pleading to which the reply or motion is addressed.

COMMENCEMENT OF PROCEEDINGS

§1100.22 *Informal complaints not seeking damages.*

(a) *Form and content.*—Informal complaint may be by letter or other writing, and will be serially numbered and filed as of the date of its receipt. No form of informal complaint is suggested, but in substance the letter or other writing (original and one copy shall be filed) must contain the essential elements of a formal complaint as specified in rules 26 and 28. It may embrace supporting papers.

(b) *Correspondence handling.*—If the informal complaint appears to be susceptible of informal adjustment, a copy or a statement of the substance thereof will be transmitted by the Commission to each person complained of in an endeavor to have it satisfied by correspondence and thus obviate the filing of a formal complaint.

(c) *Discontinuance without prejudice.*—A proceeding thus instituted on the informal docket is without prejudice to complainant's right to file and prosecute a formal complaint, in which event the proceeding on the informal docket will be discontinued.

§1100.23 *Informal complaints seeking damages.*

(a) *Actual filing required.*—Notification to the Commission that an informal complaint may or will be filed later seeking damages is not a filing within the meaning of the statute except as provided in paragraph (e) of this section.

(b) *Content.*—An informal complaint seeking damages, when permitted under the act, must be filed within the statutory period, and should contain such data as will serve to identify with reasonable definiteness the shipments or transportation services in respect of which damages are sought. Such complaint should state: (1) that complainant makes claim for damages, (2) the name of each individual seeking damages, (3) the names of defendants against which claim is made, (4) the commodities, the rate applied, the date when the charges were paid, by whom paid, and by whom borne, (5) the period of time within which or the specific dates upon which the shipments were made, and the dates when they were delivered or tendered for delivery, (6) the points of origin and destination, either specifically or, where they are numerous, by definite indication of a defined territorial or rate group of the points of origin and destination and, if known, the routes of movement, and (7) the nature and amount of the injury sustained by each claimant.

(c) *Statement of prior claim.*—If a complaint filed under paragraph (b) or (e) of this section contains a claim on any shipment which has been the subject of a previous informal or formal complaint to the Commission, reference to such complaint must be given.

(d) *Copies.*—The original of an informal complaint seeking damages must be accompanied by copies in sufficient number to enable the Commission to transmit one to each defendant named.

(e) *Special-docket proceedings.*—Where the act provides for an award of damages for violation thereof and a carrier is willing to pay them, or to waive collection of undercharges, petition for appropriate authority should be filed by the carrier on the special docket in the form prescribed by the Commission. If the petition is granted an appropriate order will be entered. Such petition, when not filed in connection with an informal complaint pending before the Commission, must be filed within the statutory period and will be deemed the equivalent of an informal complaint and an answer thereto admitting the matters stated in the petition. If a carrier is unable to file such petition within the statutory period and the claim is not already protected from the operation of the statute by informal complaint, a statement setting forth the facts may be filed by the carrier within the statutory period. Such statement will be deemed the equivalent of an informal complaint filed on behalf of the shipper or consignee and sufficient to stay the operation of the statute.

(f) *Six-months' rule.*—If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission. The matter in such complaint will not be reconsidered unless, within 6 months after the date such notice is mailed, either a formal complaint as to such matter is filed, or it is informally resubmitted on an additional basis.

Such filing or resubmission will be deemed to relate back to the date of the original filing, but reference to that date and the Commission's file number must be made in such resubmission or in the formal complaint filed. If the matter is not so resubmitted, or included in a formal complaint, as provided in this section, complainant will be deemed to have abandoned the complaint and no complaint seeking damages based on the same cause of action will thereafter be placed on file or considered unless itself filed within the statutory period.

§1100.24 *Formal complaints; copies.*

(a) *General.*—The original of each formal complaint, amended or supplemental formal complaint, or cross complaint, must be accompanied by copies in sufficient number to enable the Commission to serve one upon each defendant, including each receiver or trustee, and retain six copies in addition to the original.

(b) *Provision for State authorities.*—If complaint is made under part II of the act, or respecting State-made rates (rule 28(b)), sufficient copies in addition to those required under paragraph (a) of this section shall be furnished to permit the Commission to supply one to the appropriate authority in each of the States included in the scope of the complaint.

§1100.25 *Formal complaints; joinder.*

(a) *Causes of action.*—Two or more grounds of complaint concerning the same principle, subject, or state of facts may be included in one complaint, but should separately be stated and numbered.

(b) *Complainants.*—Two or more complainants may join in one complaint if their respective causes of action are against the same defendant or defendants and concern substantially the same alleged violation of the act and a like state of facts.

(c) *Defendants.*—If complaint is made with respect to through transportation by continuous carriage or shipment, all persons subject to the act participating therein, and against which an order is sought, should be made defendants. If complaint is made of a classification or any provision thereof, ordinarily it will suffice to make defendants the persons operating one or more through routes between representative points of origin and destination.

(d) *Correct designation of parties.*—The unabbreviated names of all parties complainant and defendant must be stated correctly.

§1100.26 *Formal complaints; allegations generally.*

A formal complaint should be so drawn as fully and completely to advise the parties defendant and the Commission in what respects the provisions of the act have been or are violated or will be violated, and should set forth briefly and in plain language the facts claimed to constitute such violation. If two or more sections or subsections of the act or requirements established pursuant thereto are alleged to be violated, the facts claimed to constitute violation of one section, subsection, or requirement should be stated separately from those claimed to constitute a violation of another section, subsection, or requirement whenever that can be done by reference or otherwise without undue repetition.

§1100.27 *Formal complaints; when damages sought.*

A formal complaint that includes a request for an award of damages should contain the information specified for an informal complaint seeking damages (rule 23, paragraphs (b) and (c)).

§1100.28 *Formal complaints; discrimination, preference, and prejudice.*

(a) *Generally.*—A complaint that alleges the act is violated because of an undue or unreasonable preference or advantage, undue or unreasonable prejudice or disadvantage, or unjust discrimination should specify clearly the particular elements stated in the act as constituting such violation, and the facts which complainant relies upon to establish it. Such elements may include a special rate, rebate, drawback, or other device; and a particular person, company, firm, association, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic.

(b) *State-made rates.*—A complaint that brings in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, upon the ground that it violates provisions of the act which prohibit undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce and persons or localities in interstate or foreign commerce, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, should bring in issue the justness and reasonableness of the rate, fare, charge, classification, regulation, or practice applicable to the interstate or foreign commerce involved in such complaint. Such complaint should also bring in issue the question as to what should be the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice that should be established so as to remove any such advantage, preference, prejudice, or such unjust discrimination.

§1100.29 *Formal complaints; other specifications.*

(a) *Tariff or schedule references.*—The several rates, fares, charges, schedules, classifications, regulations, or practices on which complaint is made should be set out by specific reference to the tariffs or schedules in which they appear, whenever that is practicable.

(b) *States in which transportation occurs.*—A formal complaint under part II of the act should specifically name the States in and through which the transportation which gives rise to the complaint is performed.

(c) *Hearing place.*—A formal complaint should be accompanied by a statement requesting modified procedure or specifying the place at which hearing is desired.

§1100.30 *Formal complaints; prayers for relief.*

(a) *Generally.*—A formal complaint in which relief for the future is sought should contain a detailed statement of the relief desired. Relief in the alternative or of several different types may be demanded, but the issues raised in the formal complaint should not be broader than those to which complainant's evidence is to be directed at the hearing.

(b) *Specific prayer for damages.*—Except under unusual circumstances, and for good cause shown, damages will not be awarded upon a complaint unless specifically prayed for, or upon a new complaint by or for the same complainant which is based upon any finding in the original proceeding.

§1100.31 *Amended and supplemental formal complaints.*

An amended or supplemental complaint may be tendered for filing by a complainant against a defendant or defendants named in the original complaint, stating a cause of action alleged to have accrued within the statutory period immediately preceding the date of such tender, in favor of complainant and against the defendant or defendants.

§1100.32 *Service of formal and cross complaints.*

The Commission will serve formal complaints. It will also serve supplemental, amended, and cross complaints and specific amendments to all complaints when it has granted leave to file such pleadings. Such service will be made personnally upon a carrier or freight forwarder or upon an agent thereof designated for purposes of service, or by mail addressed to the carrier or freight forwarder or to the agent thereof at the address filed. If no agent has been designated, service may be made by posting in the Office of the Secretary of the Commission, and if the defendant be a carrier subject to part II of the act, by also posting in the Office of the Secretary or clerk of the motor carrier regulatory board of the State wherein the motor carrier maintains headquarters. If the complaint involves only the lawfulness of rates, fares, charges, classifications, or practices, service in the manner indicated in the third sentence of this section may be made upon an attorney in fact of a carrier or freight forwarder who has filed a tariff or schedule on behalf of such carrier or freight forwarder, but such service will not be made upon a carrier subject to part I of the act unless such carrier has failed to designate an agent for service in the city of Washington.

§1100.33 *Answers and cross complaints to formal complaints.*

(a) *Generally.*—An answer may simultaneously be responsive to a formal complaint and to any amendment or supplement thereof. It must be drawn so as fully and completely to advise the parties and the Commission of the nature of the defense, including, if a departure from the requirements of section 4(1) of the act is involved, the number of the particular application or order, if any, which protects such departure; and must admit or deny specifically and in detail each material allegation of the pleading answered. An answer may embrace a detailed statement of any counterproposal which a defendant may desire to submit. Unless the issue is such that separate answers are required, answer for all defendants may be filed on their behalf by one defendant in one document, in which event the answer must show clearly the names of all defendants joining therein, and their concurrence.

(b) *Cross complaints.*—A cross complaint, alleging that other persons, parties to the proceeding, have violated the act or requirements established pursuant thereto, or seeking relief against them under the act, may be tendered for filing by a defendant with its answer.

(c) *Time for filing; copies.*—Unless otherwise directed by the Commission, an answer to a complaint should be filed within 20 days after the day on which the complaint to which answer is filed was served. The original and six copies of an answer shall be filed with the Commission.

(d) *When issue joined.*—If any defendant answers or fails to file and serve an answer within the period specified in paragraph (c), issue thereby is joined as to such defendant.

§1100.34 *Motions to dismiss or to make more definite and certain.*

(a) *As to complaint.*—Defendant may file with his answer, or with his statement under modified procedure, a motion that the allegations in the complaint be made more definite and certain, such motion to point out the defects complained of and details desired. Defendant may also file with his answer a motion to dismiss a complaint because of lack of legal sufficiency appearing on face of such complaint.

(b) *As to answer.*—No replication to the answer shall be filed, but any party may file, within 10 days after the filing of an answer, or, in the case of modified procedure, complainant may file with his statement in reply, a motion that the answer, or defendant's statement, as the case may be, be made more definite and certain, such motion to point out the defects complained of and the details desired.

§1100.35 *Satisfaction of complaint.*

If a defendant satisfies a formal complaint, either before or after answering, a statement to that effect signed by the opposing parties must be filed (original only need be filed), setting forth when and how the complaint has been satisfied. This action should be taken as expeditiously as possible.

§1100.36 *Applications, forms and instructions.*

An application filed with the Commission shall be prepared in accord with and contain the information called for in the form of application, if any, prescribed by the Commission, or any instructions which may have been issued by the Commission with respect to the filing and service of an application.

§1100.37 *Applications; notice.*

Appropriate notice of the filing of an application will be given by the applicant or by the Commission to the States, to State authorities, or to other persons as may be required by the form or instruction or by the act.

§1100.38 *Protests against applications.*

(a) *Content.*—A protest against the granting of any application shall set forth specifically the grounds upon which it is made and contain a concise statement of the interest of protestant in the proceeding.

(b) *When filed.*—Any protest shall be filed with the Commission promptly after the application is filed. If the proceeding is one respecting which the Commission has issued a notice advising the public of the filing of the application, the protest shall be filed within the time specified in such notice.

(c) *Copies; service.*—A protest filed under this section shall be served upon applicant and, unless otherwise specified in the public notice, the original and six copies of the protest shall be filed with the Commission.

(d) *When rule disregarded.*—An application may be set for hearing without awaiting the filing of a protest or of a reply thereto, and also may be disposed of without regard to the prior paragraphs of this section unless the act provides that the particular application may be granted only upon hearing.

§1100.39 *Protests in valuation proceedings.*

A protest of a tentative valuation shall contain a concise statement of the essential elements of protest with particular reference to the matters in the tentative valuation concerning which protest is made and shall include a statement of the changes therein desired by protestant. When practicable, each object of protest should be set up as a separate item in a separately numbered paragraph. Each item of protest against land values or areas must state the valuation section and zone on the Commission's maps in which the land is located. When protestant claims that property owned or used has been omitted, a full description of such property and its location must be included in the protest.

§1100.40 *Protests against tariffs or schedules.*

(a) *Content.*—The protested tariff or schedule sought to be suspended should be identified by making reference to the name of the publishing carrier, freight forwarder, or agent, to the Interstate Commerce Commission number, and to the specific items or particular provisions protested and to the effective date of the tariff or schedule. Reference should also be made to the tariff or schedule, and the specific provisions thereof, proposed to be superseded. The protest should state the grounds in support thereof, indicate in what respect the protested tariff or schedule is considered to be unlawful, and state what protestant offers by way of substitution. Such protests will be considered as addressed to the discretion of the Commission. Should a protestant desire to proceed further against a tariff or schedule which is not suspended, or which has been suspended and the suspension vacated, a separate later formal complaint or petition should be filed.

(b) *When filed.*—Protests against, and requests for suspension of, tariffs or schedules filed under the act will not be considered unless made in writing and filed with the Commission at Washington, D.C. Such protests and requests for suspension shall reach the Commission at least 12 days (except as provided in paragraph (c) of this section) before the effective dates of the tariffs, schedules, or parts thereof to which they refer, unless the protested publications were filed on less than 30-days notice under the authority of this Commission, in which event the protests should be filed not less than 5 days before such effective dates. In an emergency, telegraphic protests will be acceptable if received within the time limits herein specified, provided they also fully comply with paragraph (a) of this section and copies thereof are immediately telegraphed by protestants to the respondent carriers or their publishing agents. Six copies of such telegrams should immediately be mailed by the protestants to the Commission at Washington.

(c) *Motor carrier tariff bureau filings.*—When motor common carrier tariff bureaus file schedules of proposed general increases in rates and charges, or of a proposed rate restructuring, which proposals are subject to the special procedures prescribed in Ex Parte No. MC-82, *New Procedures in Motor Carrier Rev. Proc.*, 339 I.C.C. 324, and set forth in part 1104 of this subchapter, protests thereto shall reach the Commission at least 20 days before the published effective dates of those schedules. To assure consideration, replies to protests should reach the Commission not later than the seventh workday prior to the effective date of the protested schedules.

(d) *Copies; service.*—The original and six copies of each protest, except as provided in paragraph (e), or of each reply filed under this section, must be filed with the Commission, and one copy of the protest simultaneously must be served upon the publishing carrier, freight forwarder, or agent, and upon other persons known by protestants to be interested. These pleadings should be directed to the attention of the Suspension and Fourth Section Board.

(e) *Passenger fare increases.*—The original only of each protest or request for investigation and suspension of increased passenger fares need be filed with the Commission.

(f) *Reply to protest.*—A reply to a protest filed under this section must reach the Commission not later than the fourth working day prior to the scheduled effective date of the protested schedules unless otherwise provided.

(g) *Special requirements for protests against revisions to rail rates and charges and replies thereto.*—(1) Protests against, and requests for suspension of, tariff of schedules filed by rail carriers or the publishing agents that result in revisions of rates or charges shall also include a verified complaint containing specific facts showing: (a) that without suspension the protested tariffs or schedules will cause substantial injury to the complainant or the party represented by the complainant, (b) that it is likely that complainant or the party represented by the complainant will prevail on the merits pursuant to any applicable provisions of the act, and (c) where protestants allege that a rate is unreasonably high in violation of section 1(5)(b), they must submit evidence relating to market dominance as set forth at 49 CFR §1109.1, (2) Replies to the verified complaints filed under section shall be verified.

§1100.41 ***Service of investigation order; default where failure to comply.***

An order instituting an investigation will be served by the Commission upon respondents. If within the time period stated in that order a respondent fails to comply with any requirement specified therein, respondent shall be deemed in default and to have waived any further hearing. Thereafter the investigation may be decided without further proceedings.

PETITIONS SEEKING INSTITUTION OF RULEMAKING PROCEEDINGS

§1100.42 ***Petition seeking institution of rulemaking proceedings.***

Any person may file a petition requesting the Commission to institute a proceeding for the purpose of issuing statements, rules, or regulations of general applicability and significance designed to implement or interpret law, or to formulate general policy for future effect. No reply to such a petition may be filed. Whether a proceeding shall be instituted as requested is within the discretion of the Commission and the ruling on the petition will be final. In the event a rulemaking proceeding is instituted by the Commission, the procedure to be employed for the taking of evidence or the receipt of views and comments will be designated by Commission order.

§1100.43 ***Modified procedure, how initiated.***

The Commission may, in its discretion, order that a proceeding be heard under modified procedure if it appears that substantially all important issues of material fact may be resolved by means of written materials and that the efficient disposition of the proceeding can be made without oral hearing.

(a) ***Commission's initiative or by request.***—Modified procedure (see rule 5(j)) will be ordered in a proceeding upon the Commission's initiative or upon its approval of a request filed by any party that the modified procedure shall be observed.

(b) ***Order directing modified procedure.***—An order directing modified procedure will list the names and addresses of the persons who at that time are parties to the proceeding, and direct that they comply with the modified procedure rules. As used in rules 47, 49, and 51 the term "complainant" shall comprehend the party having the initial duty to establish the truth of the claim or to justify the relief or authorization sought, and the term "defendant" shall comprehend the party controverting the truth of the claim or opposing the relief or authorization sought.

§1100.44 ***Modified procedure; effect of order.***

(a) ***Relief from answer rule.***—Issuance of an order directing modified procedure shall relieve defendant from the obligation of answering as provided in rule 33.

(b) ***Default where failure to comply.***—If within any time period provided in the modified procedure rules a party fails to file a pleading required by those rules, or otherwise fails to comply therewith, such party shall be deemed to be in default and to have waived any further hearing. Thereafter the proceeding may be disposed of without further notice to the defaulting party, and without other formal proceedings as to such party.

§1100.45 *Modified procedure; intervention.*

Persons permitted to intervene under modified procedure shall file and serve pleadings in conformity with the provisions of rule 47 below.

§1100.46 *Modified procedure; joint pleadings.*

Parties having common interests, to the extent practicable, shall arrange for joint preparation of pleadings filed under modified procedure.

§1100.47 *Modified procedure; content of pleadings.*

(a) *Generally.*—A statement filed under the modified procedure after that procedure has been directed shall state separately the facts and arguments and include the exhibits upon which the party relies. Only facts contained in the verified statement of facts can be used in argument. If, pursuant to rule 44(a), no answer has been filed, defendant's statement must admit or deny specifically and in detail each material allegation of the complaint. In addition defendant's statement and complainant's statement in reply shall: specify those statement of fact and arguments of the opposite party to which exception is taken, and include a statement of the facts and arguments in support of such exception. Complainant's statement of reply shall be confined to rebuttal of the defendant's statement.

(b) *Exhibit identification.*—An exhibit which is part of any pleading filed under modified procedure shall serially be numbered and bear the notation, properly filled out, in the upper right hand corner: "Complainant (Defendant)
Exhibit No. , Witness

(c) *Damages.*—If an award of damages is sought the paid freight bills or properly certified copies thereof should accompany the original of complainant's statement when there are not more than 10 shipments, but otherwise the documents should be retained.

§1100.48 *Modified procedure; verification.*

The facts asserted in any pleading filed under modified procedure must be sworn to by persons having knowledge thereof, which latter fact must affirmatively appear in the affidavit. Except under unusual circumstances, such persons should be those who would appear as witnesses orally to substantiate the facts asserted should hearing become necessary. The original of any pleading filed under modified procedure must show the signature, capacity, and impression seal, if any, of the person administering the oath, and the date thereof.

§1100.49 *Modified procedure; when pleadings filed and served.*

Within 20 days from the date of service of an order requiring modified procedure, complainant shall serve upon the other parties a statement of all the evidence upon which it relies. Within 30 days thereafter defendant shall serve its statement. Within 20 days thereafter complainant shall serve its statement in reply. No further reply may be made by any party except by permission of the Commission.

§1100.50 *Modified procedure; copies of pleadings.*

Except as otherwise provided in rule 247, the original and six copies of any statement made pursuant to rule 49 shall be filed with the Commission. Subsequent pleadings are subject to rule 52.

§1100.51 *Modified procedure; hearings.*

(a) *Request for cross-examination or other hearing.*—If cross-examination of any witness is desired the name of the witness and the subject matter of the desired cross-examination shall, together with any other request for oral hearing, including the basis therefor, be stated at the end of defendant's statement or complainant's statement in reply as the case may be. Unless material facts are in dispute, oral hearing will not be held for the sole purpose of cross-examination.

(b) *Hearing issues limited.*—The order setting the proceeding for oral hearing, if hearing is deemed necessary, will specify the matters upon which the parties are not in agreement and respecting which oral evidence is to be introduced.

§1100.52 *Modified procedure; subsequent procedure.*

Procedure subsequent to that provided in the modified procedure rules shall be the same as that in proceedings not handled under modified procedure.

§1100.53 *Notice of hearing.*

(a) *Assignment; service and posting of notice; electronically recorded transcript.*—In those proceedings in which an oral hearing is to be held, the Commission will, by order or otherwise, assign a time and place for hearing. Such action will include notice when the transcript is to be made by electronic recording. Notice of such hearing will be posted in the Office of the Secretary of the Commission and will be served upon the parties and such other persons as may be entitled to receive notice under the act.

(b) *Requests for changes in assignment.*—Requests for postponements of date of hearing will be granted only for good and sufficient cause. After notice of the use of electronic recording, any request for stenographic transcript by the Commission's official reporter in lieu thereof must be made in writing to the Secretary of the Commission not less than 20 days prior to the date of the hearing. Such request will contain a statement that the requestor will provide the Commission with the original and one copy of such stenographic transcript at his own expense in accordance with the schedule of charges in the official reporting contract. In the event a request is made for a written transcript of an electronic recorded proceeding at a later date, the requestor will furnish at no expense to the Commission, an original and one copy of such written transcript for the Commission's use, in accordance with the schedule of charges in the official reporting contract.

(c) *Service of notice of assignment change.*—The Commission may confine the service of notice of a change of time or place assigned for hearing (other than by publication or posting), or of any adjourned, further, or supplemental hearing to those only who have indicated to the Commission a desire to be notified, at their own expense if telegraphic advice becomes necessary, of any such change.

§1100.54 *Subpoena.*

(a) *Requests; particularlity.*—Unless directed by the Commission upon its own motion, a subpoena to compel a witness to produce documentary evidence will be issued only upon petition showing general relevance and reasonable scope of the evidence sought, which petition must also specify with particularity the books, papers, or documents desired, and the facts expected to be proved thereby; provided, however, that for good cause shown, in lieu of a petition, the request for such a subpoena may be made orally upon the record to the officer presiding at the hearing. A request for issuance of a subpoena other than to compel the production of documentary evidence may be made either by letter (original only need be filed with the Commission) or orally upon the record to the officer presiding at the hearing. A showing of general relevance and reasonable scope of the evidence sought may be required and the subpoena will be issued or denied accordingly.

(b) *Issuance.*—A subpoena may be issued by the Commission or by the officer presiding at the hearing, but only under the signature of the Secretary or of a member of the Commission.

(c) *Service.*—The original subpoena shall be exhibited to the person served, shall be read to him if he is unable to read, and a copy thereof shall be delivered to him by the officer or person making service.

(d) *Return.*—If service of subpoena is made by a United States marshall or his deputy, such service shall be evidenced by his return thereon. If made by any other person, such person shall make affidavit thereof, stating the date, time, and manner of service; and return such affidavit on, or with, the original subpoena in accordance with the form thereon. In case of failure to make service the reasons for the failure shall be stated on the original subpoena. The written acceptance of service of a subpoena by the person named therein shall be sufficient without other evidence of return. The original subpoena bearing or accompanied by the required return, affidavit, statement, or acceptance of service, shall be returned forthwith to the Secretary of the Commission, or, if so directed on the subpoena, to the officer presiding at the hearing at which the person subpoenaed is required to appear.

(e) *Witness fees.*—A witness who is summoned and responds thereto is entitled to the same fee as is paid for like service in the courts of the United States. Such fee is to be paid by the party at whose instance the testimony is taken at the time the subpoena is served, except that when the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered at the time of service.

§1100.55 *Discovery.*

(a) *In general.*—Unless otherwise available under the Interstate Commerce Act or other applicable statutes, parties may obtain discovery pursuant to these rules (rules 55-65, inclusive) regarding any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding (other than those informal proceedings specified in rules 22, 23, 200, and 225, and proceedings that need not be determined on a record after hearing) provided that, discovery procedures (except for written interrogatories and requests for admissions) may be used only when the Commission, upon its own motion, or upon a verified petition filed by a party, and upon good cause shown, shall have entered an order approving such use. Such petitions, where required, must be filed in sufficient time to allow for the filing of replies and for consideration by the Commission without requiring the postponement of any established date for hearing or for submission of initial statements under modified procedure. Likewise, the use of discovery in those circumstances in which no petition is required must be accomplished without requiring the postponement of any established date for hearing or for submission of initial statements under modified procedure. It is not ground for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence: provided that rules 55-65, inclusive shall not apply to application proceedings handled pursuant to the modified procedure, except that in such proceedings on petition seeking appropriate discovery procedures may be filed.

(b) *Definition.*—The term "Commission,"as used in these discovery rules (rules 55-65, inclusive), means the Interstate Commerce Commission, division, Commissioner, or presiding officer.

(c) *Protective conditions.*—Upon motion by any party, by the person from whom discovery is sought, or by any person with a reasonable interest in the data, information, or material sought to be discovered, and for good cause shown, any order which justice requires may be entered to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceedings. Relief through a protective order may include one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time and place; (3) that the discovery may be had only upon such terms and conditions as the Commission may impose to insure financial responsibility in indemnifying the party or person against whom discovery is sought to cover the reasonable expenses incurred; (4) that the discovery may be had only by a method other than that selected by the party seeking discovery; (5) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (6) that discovery be conducted with no one present except persons designated in the protective order; (7) that a deposition after being sealed be opened only by order of the Commission; (8) that a trade secret or other confidential research development, or commercial information not be disclosed or be disclosed only in a designated way; and (9) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened only upon direction or order of the Commission. If the motion for a protective order is denied in whole or in part, the Commission may, on such terms and conditions as it deems just, enter an order requiring any party or person to provide or permit discovery. A protective order under this paragraph may only be sought after, or in conjunction with, an effort by any party to obtain relief under rules 58(d), 60(a), or 65.

(d) *Sequence and timing of discovery.*—Unless the Commission upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Stipulations regarding discovery.*—Unless otherwise ordered, a written stipulation entered into by all the parties and filed with the Commission may (1) provide that depositions be taken before any person, at any time or place, upon sufficient notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

§1100.56 *Deposition.*

(a) *Purpose.*—Subject to the proviso in rule 55(a), the testimony of any person, including a party, may be taken by deposition upon oral examination.

(b) *Petitions.*—The petition filed under rule 55(a) requesting an order to take a deposition and perpetuate testimony or to produce documents and materials (1) shall set forth the facts it desires to establish and the substance it expects to elicit; (2) shall be served upon all parties to the proceeding and upon the person sought to be deposed and/or the custodian of the documents or materials sought to be produced; (3) shall set forth the name and address of the witness, the place where, the time when, the name and office of the officer before whom, and the cause or reason why such deposition should be taken; and (4) shall specify with particularity the documents and materials which the deponent is requested to produce.

(c) *Order.*—If the Commission is convinced on its own initiative or by the petition requesting an order to take a deposition that the deposition will prevent a failure or delay or justice, it will serve an order upon the parties and the witness, naming the witness whose deposition is to be taken, specifying the time when, the place where, and the officer before whom the deposition is to be taken, and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The provisions for the taking of the deposition specified in the Commission's order may or may not be the same as requested in the petition. The deposition may then be taken in accordance with these rules, and the Commission may make orders of the character provided by rule 65.

§1100.57 *Depositions, location, officer, time, fees, absence, disqualification.*

(a) *Where deposition shall be taken.*—Unless otherwise ordered or agreed to by stipulation, depositions shall be taken in the city or municipality where the deponent is located.

(b) *Officer before whom taken.*—Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Within a foreign country, depositions may be taken before an officer or person designated by the Commission or agreed upon by the parties by stipulation in writing to be filed with the Commission.

(c) *Fees.*—A witness whose deposition is taken pursuant to these rules and the officer taking same, unless he be employed by the Commission, shall be entitled to the same fee paid for like service in the courts of the United States, which fee shall be paid by the party at whose instance the deposition is taken.

(d) *Failure to attend or to serve subpoena expenses.*—(1) If the party who filed a petition pursuant to rule 56(b) fails to attend and proceed with the taking of the deposition and another party attends in person or by representative pursuant to an order entered under rule 56(c), the Commission may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(2) If the party who filed a petition pursuant to rule 56(b) fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by representative because he expects the deposition of the witness to be taken, the Commission may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(e) *Disqualification for interest.*—No deposition shall be taken before a person who is a relative or employee or representative or counsel of any of the parties, or is a relative or employee of such representative or counsel or is financially interested in the proceeding.

§1100.58 *Depositions. Procedures.*

(a) *Examination.*—Examination and cross-examination of witnesses shall proceed as permitted at a hearing and shall be limited to the subject matter specified in the order under rule 56(c). All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and he shall transmit them to the officer, who shall open the sealed envelope, propound the questions to the witness, and record the answers verbatim.

(b) *Use of depositions.*—At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation, partnership, association or governmental agency (other than this Commission, except in those instances where the Commission itself is a party to the proceeding) which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer or Commission finds: (i) that the witness is dead; or (ii) that the witness is at a greater distance than 100 miles from the place of hearing, or is out of the United States, unless it appears that the absence of the winess was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at public hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. Substitution of parties does not affect the right to use depositions previously taken.

(c) *Effect of taking or using depositions.*—A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall *not* apply to the use by an adverse party of a deposition under paragraph (b)(2) of this rule. At the hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) *Motions to protect.*—At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the Commission may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in rule 55(c). If the order made terminates the examination, it shall be resumed thereafter only if so ordered. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(e) ***Recordation.***—The officer before whom the deposition is to be taken shall observe the provisions of rules 13 and 69 respecting appearances and typographical specifications, shall put the witness on oath, and shall personally, or by someone acting under his direction and in his presence, record and transcribe the testimony of the witness as required by these rules.

(f) ***Signing.***—When the testimony is fully transcribed or otherwise recorded, the deposition shall be submitted to the witness for examination and shall be read to or by him unless such examination and reading are waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 15 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used fully as though signed, unless, on a motion to suppress, it is found that the reasons given for refusal to sign require rejection of the deposition in whole or in part.

(g) ***Attestation.***—The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that the officer is not a relative or employee or representative or counsel of any of the parties, or is a relative or employee of such representative or counsel, or is financially interested in the proceeding.

(h) ***Return.***—The officer shall securely seal the deposition in an envelope indorsed with sufficient information to identify the proceeding and marked "Deposition of (here insert name of witness)" and shall either personally deliver or prompty send the original and one copy of all exhibits, by registered mail to the Secretary of the Commission. A deposition to be offered in evidence must reach the Commission not later than 5 days before the date it is to be so offered.

(i) *Notice.*—The party taking the deposition shall give prompt notice of its filing to all other parties.

(j) *Copies.*—Upon payment of reasonable charges therefor, the officer before whom the deposition is taken shall furnish a copy of it to any interested party or to the deponent.

§1100.59 ***Effect of errors and irregularities in depositions.***

(a) ***As to disqualification of officer.***—Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(b) ***As to taking of deposition.***—(1) Objection to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(c) *As to completion and return of deposition.*—Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under rules 57 and 58 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

§1100.60 ***Written interrogatories to parties.***

(a) *Availability; procedures for use.*—Subject to the provision in rule 55(a), any party may serve upon any other party written interrogatories to be answered by the party served, or if the party served is a public or private corporation, partnership, association, or governmental agency (other than this Commission, except in those instances where the Commission itself is a party to the proceeding), by any officer or agent, who shall furnish such information as is available to the party. Copies of any interrogatories served, and answers thereto, shall also be filed with the Commission. Each interrogatory shall be answered separately and fully in writing, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them and subscribed by an appropriate verification generally in the form prescribed in No. 6 of appendix B to these rules. Objections are to be signed by the representative or counsel making them. The person upon whom the interrogatories have been served shall serve a copy of the answers and objections within the time period designated by the party submitting the interrogatories, but not less than 15 days after the service thereof.

(b) *Option to produce business records.*—Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies thereof, or compilation, abstracts or summaries therefrom. If information sought is contained in computer runs, punchcards, or tapes which also contain privileged or proprietary information or information the disclosure of which is proscribed by the act, it shall be sufficient response under these rules that the person upon whom the interrogatory has been served is willing to make available to and permit an independent professional organization not interested in the proceeding and paid by the party serving the interrogatory to extract from such runs, punchcards, or tapes the information sought in the interrogatory that is not privileged or proprietary information or information the disclosure of which is proscribed by the act.

(c) *Service of interrogatories in those proceedings not requiring a petition pursuant to rule 55(c).*—In those proceedings not requiring a petition for interrogatories pursuant to rule 55(a) and unless under special circumstances and for good cause shown, no written interrogatories shall be served within 20 days prior to the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure, and when the written interrogatories are to be served in a foreign country, they shall not be served within 40 days prior to such date.

§1100.61 ***Request for admission.***

(a) ***Availability; procedures for use.***—Subject to the proviso in rule 55(a), a party may serve upon any other party a written request for the admission, for purposes of the pending proceeding only, of the truth of any matters within the scope of rule 55(a) set forth in the request, including the genuineness of any documents described in the request for admission. Copies of documents, shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Copies of any requests for admission served, and answers thereto, shall also be filed with the Commission. Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than 15 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or his representative or counsel. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for hearing may not on that ground alone, object to the request; he may, subject to the provisions of rule 65(c), deny the matter or set forth reasons why he cannot admit or deny it. Copies of any answers or objections shall be filed with the Commission.

(b) ***Effect of admission.***—Any matter admitted under this rule is conclusively established unless upon petition and a showing of good cause the Commission enters an order permitting withdrawal or amendment of the admission. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(c) ***Service of written requests for admission in those proceedings not requiring a petition pursuant to rule 55(a).***—In those proceedings not requiring a petition for requests for admission pursuant to rule 55(a), and unless under special circumstances and for good cause shown, no requests for admission shall be served within 20 days prior to the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure, and when requests for admission are to be served in a foreign country they shall not be served within 40 days prior to such date.

§1100.62 ***Depositions, requests for admission, written interrogatories, and responses thereto: inclusion in record.***

At the oral hearing, or upon the submission of statements under the modified procedure, depositions, requests for admission and written interrogatories, and respective responses may be offered in evidence by the party at whose instance they were taken. If not offered by such party, they may be offered in whole or in part by any other party. If only part of a deposition, request for admission or written interrogatory, or response thereto is offered in evidence by a party, any other party (where the matter is being heard orally) may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts. Such depositions, requests for admission and written interrogatories, and responses thereto shall be admissible in evidence subject to such objections as to competency of the witness, or competency, relevancy, or materiality of the testimony as were noted at the time of their taking or are made at the time they are offered in evidence.

§1100.63 *Supplementation of responses.*

A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement his response to include information thereafter acquired in the following instances:

(a) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify, and the substance of his testimony.

(b) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct his response.

(c) A duty to supplement responses may be imposed by order, agreement of the parties, or at any time prior to the hearing or the submission of verified statements under the modified procedure through new requests for supplementation of prior responses.

§1100.64 *Production of documents and things and entry upon land for inspection and other purposes.*

(a) *Scope.*—Subject to the proviso in rule 55(a), any party may be ordered and directed (1) to produce and permit the petitioning party to inspect any designated documents (including writings, drawings, graphs, charts, photographs, phonograph records, tapes, and other data compilations from which information can be obtained, translated, if necessary, with or without the use of detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 55(a) and which are in the possession, custody, or control of the party upon whom the order is served, but if the writings or data compilations (including computer runs, punchcards, and tapes) include privileged or proprietary information or information the disclosure of which is proscribed by the act, such writings or data compilations need not be produced under this rule but may be provided pursuant to rule 60(b); or (2) to permit, subject to appropriate liability releases and safety and operating considerations, entry upon designated land or other property in the possession or control of the party upon whom the order is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 55(a).

(b) *Procedure.*—Any petition filed pursuant to this rule shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The petition shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

§1100.65 *Failure to respond to discovery.*

(a) *Failure to answer.*—If a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under rule 58(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to rule 60(a), the party seeking discovery may apply for an order compelling an answer, by motion filed with the Commission and served on all parties and deponents. Such motion to compel an answer must be filed with the Commission within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after expiration of the period allowed for submission of answers to interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(b) *Failure to comply with order.*—(1) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the Commission, such refusal may subject the refusing party or person to action by the Commission under sections 12(3) and 12(4) of the act to compel appearance and compliance with the Commission's order.

(2) If any party or an officer, director, managing agent, or employee of a party or person refuses to obey an order made under paragraph (a) of this section requiring him to answer designated questions, or an order made under rule 64 requiring him to produce any document or other thing for inspection, copying, testing, sampling, or photographing or to permit it to be done, or to permit entry upon land or other property, the Commission may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated facts shall be taken to be established for the purposes of the proceeding in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the proceeding or any part thereof.

(c) *Expenses on refusal to admit.*—If a party, after being served with a request under rule 61 to admit the genuineness of any document or the truth of any matter of fact, serves a sworn denial thereof, and if the party requesting the admission thereafter proves the genuineness of any such document or the truth of any such matter of fact, the Commission may order the party making such denial to pay to such other party the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

(d) *Failure of party to attend or serve answers.*—If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under rule 60, after proper service of such interrogatories, the Commission on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part hereof.

(e) *Expenses against United States.*—Expenses and attorney's fees are not to be imposed upon the United States under this rule.

HEARINGS

§1100.66 ***Authority of officers.***

(a) An officer may grant leave to amend or to file any pleadings, or to intervene, upon request tendered at the hearin, but in no event shall an officer grant leave to amend if thereby the issues would be so changed as to make a referred matter one which should properly be referred to a different officer. An officer shall have power to decide any motion to dismiss the proceeding or other motion which involves final determination of the merits of the proceeding. The officer shall regulate the procedure in the hearing before him, and shall have authority to take all measures necessary or proper for the efficient performance of the duties assigned him, including the authority to hold hearings, to administer oaths and affirmations, to examine witnesses, to issue subpoenas at the hearing and (subject to the proviso of rule 55(a)) dispose of requests for discovery, to hold conferences for the settlement and simplification of issues, to rule on motions and dispose of procedural requests, to make initial decisions, and to take any other action authorized by this part, by the Administrative Procedure Act, or by the Interstate Commerce Act and related acts. Any proceedings in which an oral hearing is held and in which the officer can announce his decision either (1) on the record after the close of the taking of testimony and the hearing of arguments by the officer, or (2) by appropriate notification to the parties after the close of hearing may be made the subject of an initial decision prepared by a party or parties in whose favor the officer decides, within a period specified by the officer, and subject to such changes as the officer considers appropriate in the draft prepared for him.

(b) At any oral hearing conducted before the Commission, an Administrative Law Judge, or joint board, at which an official record of the proceeding is made, the recording of the hearing by means of live or delayed television, radio, or the use of a tape recorder or other electronic or photographic equipment by any person other than the official reporter will not be permitted without special permission of the Chairman of the Commission.

§1100.67 ***Prehearing conferences.***

(a) ***Purposes.***—Upon written notice by the Commission in any proceeding, or upon written or oral instruction of an officer, parties or their attorneys may be directed to appear before an officer at a specified time and place for a conference, prior to or during the course of a hearing, or in lieu of personally appearing, to submit suggestions in writing, for the purpose of formulating issues and considering:

(1) The simplification of issues;

(2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;

(3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by any or all parties of matters of public record, such as annual reports and the like, to the end of avoiding the unnecessary introduction of proof;

(4) The procedure at the hearing;

(5) The limitation of the number of witnesses;

(6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and

(7) Such other matters, including disposition of requests for discovery, as may aid in the simplification of the evidence and disposition of the proceeding.

Parties may request prehearing conference.

(b) *Facts disclosed privileged.*—Facts disclosed in the course of the prehearing conference and privileged and, except by agreement, shall not be used against participating parties either before the Commission or elsewhere unless fully substantiated by other evidence.

(c) *Recordation and order.*—Action taken at the conference, including a recitation of the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered and defining the issues, shall be recorded in an appropriate order, unless the parties enter upon a written stipulation as to such matters, or agree to a statement thereof made on the record by the officer.

(d) *Objection to the order; subsequent proceedings.*—If an order is entered, a reasonable time shall be allowed to the parties to present objections on the ground that it does not fully or correctly embody the agreements reached at such conference. Thereafter the terms of the said order or modification thereof, the written stipulation, or statement of the officer, as the case may be, shall determine the subsequent course of the proceedings, unless modified to prevent manifest injustice.

§1100.68 *Stipulations.*

Apart from the procedure contemplated by the prehearing provisions (rule 67), and upon permission granted, the parties may in the discretion of the officer, by stipulation in writing filed with the Commission at any stage of the proceeding, or orally made at the hearing, agree upon any pertinent facts in the proceeding. It is desired that the facts be thus agreed upon so far as and whenever practicable.

§1100.69 *Appearances; standard of conduct; absence from hearing.*

(a) *Who may appear.*—Any individual may appear for himself and any member of a partnership which is a party to any proceeding may appear for such partnership upon adequate identification. A bona fide officer or a full-time employee of a corporation, association, or of an individual may appear for such corporation, association, or individual by permission of the officer presiding at the hearing. A party also may be represented by a practitioner.

(b) *Appearances.*—An appearance may be either general, that is, without reservation, or it may be special, that is, confined to a particular issue or question. When a practitioner enters an appearance at a hearing he will be expected to represent his client faithfully until the completion of the proceeding in which he has been retained, or until the completion of the part of the proceeding for which he has specially appeared. A practitioner who has entered his appearance at the hearing shall not be permitted to withdraw from the hearing, or willfully to absent himself therefrom, except for good cause and, wherever practicable, only with the permission of the presiding officer. If a person desires to appear specially, he must expressly so state when he enters his appearance and at that time he shall also state the questions or issues to which he is confining his appearance; otherwise, his appearance will be considered as general.

(c) *Standard of conduct.*—Contemptuous conduct by any person appearing at a hearing shall be ground for his exclusion by the presiding officer from the hearing.

(d) *Absence from hearing.*—If a party or the person representing him shall, after entering an appearance, attempt to withdraw from the hearing in a manner other than that specified in paragraph (b) of this section, the Commission on its own motion, or on motion of any party to the proceeding, may take such action as, in the interest of justice and the protection of the lawful rights of all parties to the proceeding, the circumstances of the case may warrant, including the striking out of all or any part of any pleading of the offending party, and including the possible dismissal of the action or proceeding, or any part thereof, the entry of an order of default against that party, or the disciplining of the practitioner concerned.

§1100.70 *Intervention; petitions.*

(a) *Content generally.*—A petition for leave to intervene must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. If the proceeding be by formal complaint and affirmative relief is sought by petitioner, the petition should conform to the requirements for a formal complaint.

(b) *When filed.*—A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after, except for good cause shown.

(c) *Broadening issues; filing.*—If the petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in season to permit service upon and answer by the parties in advance of the hearing.

(d) *Copies; service; replies.*—When tendered at the hearing, sufficient copies of a petition for leave to intervene must be provided for distribution as motion papers to the parties represented at the hearing. If leave be granted at the hearing, one additional copy must be furnished for the use of the Commission. When a petition for leave to intervene is not tendered at the hearing, the original and three copies of the petition shall be submitted to the Commission together with a certificate that service in accordance with rule 20 has been made by petitioner. Any reply in opposition to a petition for leave to intervene not tendered at the hearing must be filed within 20 days after service. In the discretion of the Commission leave to intervene may be granted or denied before the expiration of the time allowed for replies.

(e) *Disposition.*—Leave will not be granted except on averments reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner thereby becomes an intervener and a party to the proceeding.

§1100.71 *Participation without intervention.*

In an investigation proceeding, or in a proceeding under section 1a, of the act, and in a proceeding of any one of the characters herein enumerated when heard on a consolidated record with a complaint proceeding, but in no other proceeding, an appearance may be entered at the oral hearing, or in any proceeding in which the justness or reasonableness of any rate, rule, charge, or other provision of a tariff is at issue and the Commission has ordered that the proceeding be heard under modified procedure, without filing a petition in intervention or other pleading, if no affirmative relief is sought, if there is full disclosure of the identity of the person or persons in whose behalf the appearance is to be entered, if the interest of such person in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed. A person in whose behalf an appearance is entered in this manner becomes a party to the proceeding.

§1100.72 ***Witness examination; order of procedure.***

Witnesses will be orally examined under oath before the officer unless their testimony is taken by deposition or the facts are presented to the Commission in the manner provided under modified procedure. In formal-complaint, application, and investigation proceedings, complainant, applicant, and respondent, respectively, shall open and close at the hearing, except at further hearings granted on petition the petitioner requesting further hearing shall open and close; and except, further, that parties other than the respondent shall open and close in investigations in which the burden of proof is not upon the respondent. Interveners shall follow the party in whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer, who also shall designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record.

§1100.73 *Evidence; admissibility generally.*

Any evidence which is sufficiently reliable and probative to support a decision under the provisions of the Administrative Procedure Act, or which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, shall be admissible in hearings before the Commission. The rules of evidence shall be applied in any proceeding to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

§1100.74 *Evidence; cumulative restriction.*

It shall be the duty of the officer before whom any proceeding is being heard to limit the number of witnesses whose testimony may be merely cumulative. And in order to enforce this section, the officer may require a clear statement on the record of the nature of the testimony to be given by any witness proffered.

§1100.75 *Evidence; prepared statements.*

With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expressions of his opinion prepared by him, or written answers to interrogatories of counsel, or a prepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement shall not include argument; that before any such statement is read, or admitted in evidence the witness shall deliver to the officer, the reporter, and to opposing counsel as may be directed by the officer, a copy of such statement or of such interrogatories and his written answers thereto; and that the admissibility of the evidence contained in such statement shall be subject to the same rules as if such testimony were produced in the usual manner, including the right of cross-examination of the witness. Such approval ordinarily will be denied when in the opinion of the officer the memory or demeanor of the witness may be of importance.

§1100.76 *Evidence; official records.*

An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the

United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry. This section does not prevent the proof of official records or of entry or lack of entry therein or official notice thereof by a method authorized by any applicable statute or by the rules of evidence.

§1100.77 *Evidence; entries in regular course of business.*

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it shall appear that it was made in the regular course of business, and that it was the regular course of business to make such memorandum or record at the time such record was made, or within a reasonable time thereafter.

§1100.78 *Evidence; documents containing matter not material.*

When material and relevant matter offered in evidence is in a document containing other matter not material or relevant, the offering party shall produce the document at the hearing, shall plainly designate the matter so offered, and shall accord to the officer and to participating counsel an opportunity to inspect it. Unless it is desired to read such matter into the record, and the officer so directs, true copies in proper form of the material and relevant matter taken from the document may be received as an exhibit, but other parties shall be afforded an opportunity to introduce in evidence, in like manner, other portions of such document if found to be material and relevant. The document itself will not be received.

§1100.79 *Evidence; documents in Commission's files.*

(a) *In general.*—If any matter contained in a report or other document, not a tariff or schedule, open to public inspection in the files of the Commission is offered in evidence such report or other document need not be produced but in other respects the provisions of rule 78 will apply.

(b) *Tariffs and schedules; official notice in investigation proceedings.*—If any matter contained in a tariff or schedule on file with the Commission is offered in evidence, such tariff or schedule need not be produced or marked for identification, but the matter so offered shall be specified with particularity in such manner as to be readily identified and may be received in evidence subject to check by reference to the original tariff or schedule. Official notice will be taken without offer or production of that portion of any tariff or schedule which is the subject matter of an order of investigation and suspension.

§1100.80 *Evidence; records in other Commission proceedings.*

If any portion of the record before the Commission in any proceeding other than the one on hearing is offered in evidence a true copy of such portion shall be presented for the record in the form of an exhibit unless:

(a) The party offering the same agrees to supply such copy later at his own expense, if and when required by the Commission; and

(b) The portion is specified with particularity in such manner as to be readily identified; and

(c) The parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference, and that any other portion offered by any other party may be incorporated by like reference subject to paragraphs (a) and (b) of this section; and

(d) The officer directs such incorporation. Any such portion so offered, whether in the form of an exhibit or by reference, shall be subject to objection.

§1100.81 *Evidence; abstracts of documents.*

When documents, such as freight bills or bills of lading, are numerous, the officer may refuse to receive in evidence other than a limited number of such documents said to be typical. Instead he may instruct, if the proffer be for the purpose of proving damage, that introduction be deferred until there is opportunity to comply with rule 95. If the proffer be for other purpose the officer may require the party in orderly fashion to abstract the relevant data from the documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and thereupon offer such abstract in evidence in exhibit form.

§1100.82 *Evidence; exhibits.*

(a) *Generally.*—Exhibits of a documentary character may have a maximum width of 22 inches by 12 1/2 inches in height. Whenever practicable the sheets of each exhibit and the lines of each sheet should be numbered. If the exhibit consists of five or more sheets the first sheet or title page should be confined to a brief statement of what the exhibit purports to show, with reference by sheet and line to illustrative or typical examples contained therein. The exhibit should bear an identifying number, letter, or short title which will readily distinguish it from other exhibits offered by the same party. It is desirable that, whenever practicable, rate comparisons and other evidence should be condensed into tables. Whenever practicable, especially in proceedings in which it is likely that many documents will be offered, all the documents produced by a single witness should be assembled and bound together, suitably arranged and indexed, so that they may be identified and offered as one exhibit. Exhibits should not be argumentative and should be limited to statements of fact, and be relevant and material to the issue, which can better be shown in that form than by oral testimony.

(b) *Reference to tariff authority, routes, and distances.*—All exhibits showing rates, fares, charges, or other tariff or schedule provisions must, by appropriate Interstate Commerce Commission number reference, indicate the tariff or schedule authority therefor, and if distances are shown must also show the authority therefor and, by lines, highways, or waterways, and junction points, the routes over which the distances are computed; except that the routes over which the distances are computed need not be shown when such distances are specifically published in a tariff or schedule lawfully on file with the Commission, or definitely ascertainable from a tariff or schedule on file with the Commission showing rates prescribed by the Commission and based on short-line distances, or short-highway distances, provided the exhibit makes specific reference to such tariff or schedules as provided by this section.

(c) *Copies.*—Unless the officer shall otherwise direct, the original and one copy of each exhibit of a documentary character shall be furnished for the use of the Commission—original to be delivered to the reporter, and the copy to the officer. If the hearing be before a board, a copy of the exhibit shall be furnished to each member of the board, unless the board otherwise directs. Unless the officer for cause directs otherwise, a reasonable number of copies shall be furnished to counsel in attendance at the hearing. Unless the officer shall otherwise direct, in proceedings under the Uniform Bankruptcy Act, the original and three copies of every exhibit of a documentary character shall be furnished for use of the Commission—original to be delivered to the reporter, and the three copies to the office.

(d) *Interchange prior to hearing.*—Whenever practicable, the parties should interchange copies of exhibits or other pertinent material or matter before or at the commencement of the hearing; and the Commission or presiding officer may so direct.

(e) *When excluded how treated.*—In case an exhibit has been identified, objected to, and excluded, the officer will develop whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to him. If the excluded exhibit is not withdrawn it should be given an exhibit number for identification and be incorporated in the record. Exhibit numbers once used for identification will not be duplicated thereafter.

§1100.83 *Record in referred matter unaffected by a second reference.*

If for any reason an order referring a matter to a particular officer is vacated and the matter referred to a different officer, any testimony already taken in such proceeding shall be part of the record along with any testimony which thereafter may be taken.

§1100.84 *Evidence; filing of subsequent to hearing; copies.*

Except as provided below or as expressly may be permitted in a particular instance, the Commission will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, and may return any such documents to the sender. Before the close of a hearing the officer may, at the request of a party or upon his own motion, or upon agreement of the parties, require that a party furnish additional documentary evidence supplementary to the existing record, within a stated period of time. Documentary evidence thus to be furnished will be given an exhibit number at the time of filing and the parties accordingly advised. Unless otherwise directed by the officer, the original and one copy of such submission shall be filed with the Commission.

§1100.85 *Ruling of an officer at hearing; objection to.*

Formal exception to a ruling of an officer at a hearing is unneccessary. It is sufficient that a party, at the time the ruling is made or sought, make known to the officer on the record the action which he desires the officer to take or his objection to the action of the officer and his grounds therefor. An objection not pressed in brief will be considered as waived. Where no brief is filed an objection will be considered as waived if not pressed in exceptions or reply to exceptions, if filed, or in a separate petition dealing only with that objection. Rulings of the presiding officer at the hearing may not be appealed prior to service of the initial decision except where such ruling (a) may result in substantial detriment to the public interest or undue prejudice to any party, and the presiding officer so finds, (b) denies or terminates any person's participation, (c) grants a request for the inspection of documents not ordinarily available for public inspection, (d) overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents, or (e) for some other reason might, in the opinion of the presiding officer, result in substantial irreparable harm.

§1100.86 *Oral argument before the hearing officer.*

At the discretion of the hearing officer and upon reasonable notice to the parties, oral argument may be made at the close of testimony before him as an alternative to the filing of written briefs. Such argument, which should include requested findings and conclusions, will be recorded and made a part of the transcript of testimony, and will be available to the Commission for consideration in deciding the case. The making of such argument shall not operate to preclude oral argument before the Commission pursuant to rule 93.

§1100.87 *Continuance for further hearing.*

A continuance may be granted by the presiding officer if it is impossible to conclude a hearing within the time available, or for any reason a continuance is necessary or advisable, but a joint board shall not set a date and place for a continued hearing without first consulting the Commission. If consultation with the Commission is impracticable, the hearing shall be adjourned by the joint board to such time and place as the Commission subsequently shall determine.

§1100.88 *Transcript of record.*

(a) *Filing.*—After the close of the hearing the complete transcript of testimony taken and the exhibits shall be filed with the Commission.

(b) *Corrections.*—A suggested correction in a transcript ordinarily will be considered only if offered not later than 20 days after the date each transcript is filed with the Commission. A copy of the letter (original only need by filed with the Commission) requesting the suggested corrections shall be served upon all parties of record and with two copies to the official reporter.

(c) *No free copies.*—No free copies of transcript will be furnished to any party to any proceeding.

BRIEFS; REPORTS; ORAL ARGUMENT

§1100.89 *Briefs; content and arrangement.*

(a) *Due date.*—The due date of each brief must appear on its front cover or title page.

(b) *Table of contents; citations.*—A brief of more than 20 pages shall contain on its front flyleaf a table of contents and points made with page references, the table of contents of be supplemented by a list of citations, alphabetically arranged, with references to the pages in which they appear.

(c) *Sketch or chart.*—In proceedings wherein misrouting or undue prejudice or preference are alleged, the complainant should include as part of the brief a small sketch or chart adequately reflecting the situation.

(d) *Evidence abstract.*—A brief filed after a hearing may contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the pages of the record, if written, or exhibit where the evidence appears.

In the event the party elects not to include a separate abstract in his brief, he should give specific reference to the portions of the record, whether transcript or otherwise relied upon in support of the respective statements of fact made throughout the brief.

(e) *Requested findings.*—Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make.

(f) *Exhibit reproduction.*—Exhibits should not be reproduced in the brief, but may, if desired, be shown, within reasonable limits, in an appendix to the brief. Analyses of such exhibits should be included in the brief where pertinent.

§1100.90 *Briefs; when filed.*

In a proceeding which has been the subject of oral hearing, and in which briefs are to be filed, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from the close of the hearing unless otherwise ordered by the Commission. Reply briefs are not permitted unless ordered by the Commission.

§1100.91 *Initial decision.*

(a) *How served.*—An initial decision will be served by mailing a copy to each party of record and to other persons who are believed to have an interest in the proceeding.

(b) *When and how effective as the order of the Commission.*—If no exceptions or appeal is filed to the initial decision made: (i) in any proceeding by a Commissioner, an administrative law judge, or a joint board, or (ii) in rail proceedings by an employee board or division, and the Commission does not stay it, the initial decision becomes the order of the Commission upon expiration of the period for filing exceptions or appeals, or of any postponement of such period, or postponement of the effective date of such initial decision, and a notice stating that the initial decision has, giving the date, become the order of the Commission will be mailed to the parties by the Commission. In nonrail proceedings, the initial decision of officers other than individual Commissioners, administrative law judges, and joint boards are effective as the decision of the Commission, although administrative appeals as defined in rule 97 may be filed.

§1100.92 *Voiding initial decision.*

The division or Commission may, in its discretion, void any requirement for an initial decision and may direct that any matter shall be considered forthwith by the division or Commission if it concludes that the matter involves a question of agency policy, a new or novel issue of law, or an issue of general transportation importance or if the due and timely execution of its functions so requires. All parties of record shall be notified by the Commission whenever the Commission or division voids the requirement for an initial decision.

§1100.93 *Oral argument before Commission.*

(a) *Request, to whom address.*—Request for oral argument should be addressed to the Secretary, Interstate Commerce Commission. Oral argument shall be at the discretion of the Commission or its division.

(b) *Request, by whom made.*—Any party may submit a written request for oral argument, stating reasons therefor. No replies shall be entertained.

(c) *Request, when filed.*—Requests for oral argument shall be filed within 30 days after the date of service of the decision, order or requirement being appealed, unless a different time period is fixed by the Commission or division, which shall rule upon such requests by order.

(d) *Time allotment.*—Unless otherwise directed, the proponents of a rule or order will be allowed one-half hour for oral argument and shall be heard first. Opponents, in the aggregate, will also be allowed one-half hour. One counsel only will be heard for each side, unless additional presentations are specifically authorized and additional time is allocated of them.

ORDER COMPLIANCE, DAMAGE STATEMENTS

§1100.94 *Compliance with Commission's orders.*

When in consequence of proceedings under the act, the Commission has by its order directed a defendant or a respondent to do or desist from doing a particular thing, such defendant or respondent must notify the Commission on or before the date upon which such order becomes effective of the manner and details of compliance with the order. Such notification shall be in the form of an affidavit subscribed by an appropriate vertification generally in the form prescribed in No. 6 of appendix B to these rules and must, when filed or tendered to the Commission for filing, show simultaneous service thereof upon all parties to the proceeding in accordance with rule 20(a). If a change in rates or schedules is required, the notification must be given in addition to the filing of proper tariffs or schedules, and must specify the Interstate Commerce Commission numbers of the tariffs or schedules so filed.

§1100.95 *Statements of claimed damages based on Commission findings.*

When the Commission finds that damages are due, but that the amount cannot be ascertained upon the record before it, the complainant should immediately prepare a statement showing details of the shipments on which damages are claimed, in accordance with the form No. 5. (See appendix B.) The statement should not include any shipment not covered by the Commission's findings, or any shipment on which complaint was not filed with the Commission within the statutory period. The filing of a statement will not stop the running of the statute of limitations as to shipments not covered by complaint or supplemental complaint. If the shippers moved over more than one route, a separate statement should be prepared for each route, and separately numbered, except that shipments as to which the collecting carrier is in each instance the same may be listed in a single statement if grouped according to routes. The statement, together with the paid freight bills on the shipments, or true copies thereof, should then be forwarded to the carrier which collected the charges, for verification and certification as to its accuracy. If the statement is not forwarded immediately to the collecting carrier for certification, a letter request from defendants that forwarding be expedited will be considered to the end that steps be taken to have the statement forwarded immediately. All discrepancies, duplications, or other errors in the statements should be adjusted by the parties and corrected agreed statements submitted to the Commission. The certificate must be signed in ink by a general accounting officer of the carrier and should cover all of the information shown in the statement. If the carrier which collected the charges is not a defendant in the case, its certificate must be concurred in by like signature on behalf of a carrier defendant. Statements so prepared and certified shall be filed with the Commission whereupon it will consider entry of an order awarding damages.

§1100.96 ***Administrative appeals—proceeding involving both rail and nonrail matters.***

Administrative appeals shall be governed by the provisions of rule 98 (rail proceedings) in any proceeding in which a significant rail matter is involved, regardless of whether nonrail matters are also involved.

§1100.97 *Administrative appeals—nonrail proceedings.*

The rules in this section apply to nonrail proceedings:

(a) *General.*—The term "administrative appeals" means exceptions and petitions for administrative review.

(b) *Exceptions.*—(1) Exceptions may be filed to an initial or tentative decision of an individual Commissioner, an administrative law judge, a joint board, or an examiner, and shall detail the assailed findings, with supporting citations to the record and authorities.

(2) Exceptions shall be confined to factual and legal issues which are essential to the ultimate and just determination of the proceeding and shall be based on the following grounds:

(i) That a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record;

(ii) That a necessary legal conclusion or finding is contrary to law, Commission precedent, or policy;

(iii) That an important question of law, policy, or discretion is involved which is without governing precedent; or

(iv) That prejudicial procedural error has occurred.

(3) Exceptions shall not exceed 30 pages in length, including the index of subject matter, argument, and appendixes or other attachments, and replies shall be subject to the same limitation.

(4) Exceptions which are not timely filed or do not comply with the requirements in (1) through (3) above will be subject to rejection.

(c) *Conclusiveness.*—Unless the division or Commission, as the case may be, reverses, changes or modifies the prior decision, order, or requirement or unless the decision, order or requirement is issued by the division or Commission in the first instance, or unless the decision, order, or requirement is issued by an employee board, no further administrative appeal shall lie.

(d) *Petitions for administrative review.*—(1) Except when no further administrative appeal shall lie, any party may file a petition for administrative review, which shall detail in what respects further hearing, rehearing, reargument or reconsideration is sought and the reasons therefor. (2) Such specifications of alleged error, relief sought, and argument in support thereof must be summarized, in a preface to the petition, suitably paragraphed, which shall be a succinct, but accurate and clear, condensation of the matters raised on petition. Except in extraordinary circumstances, and upon leave granted, the preface shall not exceed three pages. Replies to petitions shall also contain a preface of no more pages than permitted in the petition's preface, and shall address, point by point, the specifications of alleged error, relief sought, and argument in the preface to the petition. In proceedings in which a division reverses, changes, or modifies a prior decision by a hearing officer or an employee board, petitions for reconsideration addressed to the division in a appellate capacity, and replies thereto, shall not exceed 10 pages, in addition to the preface required by this paragraph. In all other proceedings, petitions for reconsideration, and replies thereto, shall not exceed 30 pages in addition to the preface required by this paragraph. (3) When in a petition filed under this section opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(e) *Time for filing.*—Exceptions and petitions for administrative review shall be filed within 30 days after the date of service of the decision, order or requirement. For replies, see rule 21.

(f) *Successive petitions.*—A party shall not be permitted to file a second administrative appeal unless the division or Commission, as the case may be, shall have reversed, changed or modified the prior decision, order or requirement, or where the decision, order, or requirement is issued by the division or Commission in the first instance, in which event the petition shall be limited to the reversal, change or modification, and successive administrative appeals upon substantially the same grounds shall not be entertained.

(g) *Administative finality.*—The timely filing of exceptions and petitions for administrative review shall, and the Commission on its own motion may, stay the effect of the decision, order or requirement until thirty days after the date of service of the order of the Commission, division, or review board acting thereon, unless otherwise provided. Decisions of an employee board whether original or on review, are not administatively final.

(h) *Matters of general transportation importance.*—(1) Limitations on petitions for review of division decisions. Pursuant to authority granted in section 17(6) of the Interstate Commerce Act, the right to apply to the entire Commission for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division of the Commission in any proceeding shall be limited and restricted to those proceedings in which the entire Commission, on its own motion, determines and announces that an issue of general transportation importance is involved. In proceedings in which no such announcement has been made, but in which a division reverses, changes, or modifies a prior decision by a hearing officer or where the initial decision is made by a division, a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and with administrative finality.

(2) Petitions seeking a finding that an issue of general transportation importance is involved; three-page limitation; time for filing; no reply permitted. In any proceeding which has involved the taking of evidence at oral hearing or by modified procedure in which the Commission has not noted the presence of an issue of general transportation importance, any party may, within 15 days after the service of a final decision, order, or requirement of a division or appellate division, as to which the filing of a petition for rehearing, reargument, or reconsideration is not permitted, file a petition requesting the Commission to find on its own motion that the proceeding is one involving an issue of general transportation importance. Any petition seeking such a finding shall not be considered an application for rehearing, reargument, or reconsideration within the meaning of section 17 of the act and shall not exceed three pages, excluding the title page and the page containing certificate of service. No reply

thereto may be filed and the ruling thereon will be final. Petitions seeking the relief specifically covered herein will not be entertained at any other stage of the proceeding.

(3) *Copies of petitions and replies.*—In cases in which it has been determined and announced that an issue of general transportation importance is involved, there shall be furnished for the use of the Commission the original and 14 copies of each petition filed under this section and of replies to such petitions. A like number of copies shall be furnished of petitions seeking a finding that the proceeding involves an issue of general transportation importance.

(i) *Petitions for stay.*—A party may petition for stay of a decision, order or requirement pending a request for judicial review, for extension of the compliance date, for modification of the effective date or for similar procedural relief, stating reasons therefor. Such a petition shall be filed no less than five (5) working days in advance of the effective date, and no replies shall be entertained.

§1100.98 *Administrative appeals—rail proceedings.*

The rules in this section apply to rail proceedings:

(a) *General.*—The term "administrative appeals" means appeals and petitions for administrative review.

(b) *Appeal of initial decision.*—(1) Any party may appeal from any decision which is issued in the first instance unless such an appeal is precluded by the time constraints of the Railroad Revitalization and Regulatory Reform Act of 1976. (2) Appeals shall detail the assailed findings, with supporting citations to the record and authorities. Appeals shall be confined to actual and legal issues which are essential to the ultimate and just determination of the proceeding and shall be based on the following grounds:

(i) That a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record;

(ii) That a necessary legal conclusion or finding is contrary to law, Commission precedent or policy;

(iii) That an important question of law, policy, or discretion, is involved which is without governing precedent;

(iv) That prejudicial procedural error has occurred.

(3) Appeals shall not exceed 30 pages in length, including the index of subject matter, argument, and appendixes or other attachments, and replies shall be subject to the same limitation.

(4) Appeals which are not timely filed or do not comply with the requirements in (1) through (3) above will be subject to rejection.

(c) *Time for filing.*—Appeals, including petitions for administrative review under this rule must be filed within 20 days after the service of the decision being reviewed, or within such further period (not to exceed 20 days) as the division or Commission may authorize. If no such appeal is timely filed, the order set forth in such decision shall become the order of the Commission at the expiration of the time for filing.

(d) *Successive administrative appeals.*—A party shall not be permitted to file a second administrative appeal, except that (1) petitions for administrative review pursuant to paragraph (e) below, and (2) petitions for stay pursuant to paragraph (g) below shall be permitted.

(e) *Discretionary review of final decisions.*—(1) Any party may file a petition for administrative review of the decision, order, or requirement of the division or Commission, subject to the following requirements:

(i) That the petition shall detail in what respects the proceeding involves a matter of general transportation importance or new evidence of changed circumstances exist which would materially affect the prior decision, order or requirement, and include a request that the Commission make such determination.

(ii) That, to the extent further hearing, rehearing, reargument or reconsideration is sought, the petition shall detail in what respects such relief is requested and the reasons therefor. When in a petition filed under this section opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(iii) That the petition shall not exceed 10 pages in length, although a separate preface and summary of arguments not exceeding three pages may also accompany the petition. Replies shall be subject to the same requirements.

(2) The filing of the petition itself shall not stay the effect of the prior decision, order or requirement.

(f) *Effectiveness.*—(1) The timely filing of an appeal shall stay the effect of the decision, order, or requirement pending the determination of such appeal. (2) Unless otherwise provided, the Commission, on its own motion, or upon petition, may stay the effect of a decision, order, or requirement of the division or Commission. (3) Any decision order, or requirement of the division or Commission not stayed shall become effective 30 days after it is served on the parties, unless the Commission provides for such decision, order, or requirement to become effective at an earlier date.

(g) *Petition for stay.*—A party may petition for stay of a decision, order, or requirement pending a request for judicial review, for extension of the compliance date, for modification of the effective date or for similar procedural relief, stating the reasons therefor. Such a petition shall be filed no less than five working days in advance of the effective or compliance date, and no replies shall be entertained.

§1100.99 *Petitions not otherwise covered.*

A party seeking relief not otherwise provided for by these rules may file a petition for such relief, stating reasons therefor. Petitions barred by any other rule of practice shall not be entertained.

SPECIAL RAIL REQUIREMENTS

§1100.100 *Application of the rules: time limits—proceedings involving common carriers by railroad.*

In applying these rules to proceedings involving common carriers by railroad subject to part I of the Interstate Commerce Act, the Commission will be governed by the time limits specified in section 17(9) and (14) of said act, as set forth in appendix G.

§1100.101 *Utilization of the Rail Services Planning Office and other Commission employees.*

The Commission may, in its discretion, call upon the Rail Services Planning Office for assistance in evaluation, analysis, fact finding, and planning, particularly with regard to rulemaking proceedings, mergers, and appeals within the Commission in an effort to focus issues and expedite matters before the Commission.

In rulemaking proceedings or complex adjudicatory proceedings, the Commission will utilize additional administrative law judges and employees of the Rail Services Planning Office for the taking of evidence or the receipt of views and comments and may, by Commission order, designate such additional procedures as it deems necessary to insure the expedited resolution of such proceeding.

§1100.102 *Enforcement of time limits; disposition of pleadings—proceedings involving common carriers by rail.*

(a) *Enforcement of time limits.*—In proceedings with respect to any matter involving a common carrier by railroads, the failure of any party to meet prescribed time limits without a showing of extraordinary circumstances may result in the dismissal of any involved complaint, application or appeal or the striking of any petition, pleading, or motion. Should the Commission fail to meet a prescribed time limit for disposition of any matter, it must issue a statement to all parties of record: (1) explaining the reason for its failure, and (2) delineating the steps it will take to expedite the matter.

(b) *Disposition of pleadings.*—In proceedings with respect to any matter involving a common carrier by railroad, any pleading or motion for which no specific provision as to time for disposition is made must be disposed of expeditiously and, in any event, not later than 120 days after the time permitted for filing pleadings and replies.

SUBPART B—SPECIAL RULES OF PRACTICE

§1100.200 *Rules of practice governing procedure in certain suspension and fourth-section matters.*

(a) The proceedings of the Suspension and Fourth Section Board shall be informal. No transcriptions of such proceeding will be made. Subpoenas will not be issued and, except when applications or petitions are required to be attested, oaths will not be administered.

(b) Petitions for reconsideration of orders of the following may be filed by any interested person within 20 days after the date of the service of the orders:

(1) Of Suspension and Fourth Section Board,

(2) Of Appellate Division 2 reversing, changing, or modifying a previous determination of an employee board, and

(3) Of Division 2 suspending schedules or granting or denying fourth-section relief prior to hearing in proceedings not subject to a prior determination by an employee board.

The original and six copies of every pleading, document or paper filed under this section shall be furnished for the use of the Commission. Any interested person may file and serve a reply to any petition for reconsideration permitted under this paragraph within 20 days after the filing of such petition with the Commission but if the facts stated in any such petition disclose a need for accelerated action, such action may be taken before expiration of the time allowed for reply. In all other respects, such petitions and replies thereto will be governed by the Commission's rules of practice.

(c) When the Suspension and Fourth Section Board has declined to suspend a proposed tariff or schedule, or any part thereof, a petition in writing by any protestant or protestants may be filed with the Commission for reconsideration by the designated appellate division provided it reaches the Commission at least 2 workdays prior to the effective date of the tariff or schedule in question. For the purposes of this section, a workday shall be considered as any day except Saturday, Sunday, or legal holiday in the District of Columbia. (A legal holiday of less than 1 day shall be considered a workday within the meaning of this section.) Petitions submitted under this section shall be filed with the Secretary of the Commission by 4 p.m., United States Standard Time (or by 4 p.m., Local Daylight Saving Time if that time is observed in the District of Columbia). Telegraphic notice or the equivalent thereof must be given by the petitioners to the respondent or respondents. As no replies to the petitions for reconsideration are contemplated under this rule, petitioners will be expected, except in unusual circumstances, to rely wholly on the information previously filed with the Suspension and Fourth Section Board. Written or telegraphic communication in intelligible form requesting reconsideration will be sufficient. Such request shall contain the following prefatory statement: "This matter requires expedited handling under rule 200 of the Commission's Rules of Practice." A petition not timely filed shall be rejected by the Secretary.

§1100.225 *Rules of practice governing the procedures of the Motor Carrier Board, the Finance Board, the Operations Boards, the Special Permission Board, the Released Rates Board, and the Tariff Rules Board.*

(a) The proceedings of the Motor Carrier Board, the Finance Board, the Operations Boards, the Special Permission Board, the Released Rates Board, and the Tariff Rules Board shall be informal. No transcript of such proceedings will be made. Subpoenas will not be issued and, except when applications, petitions, or statements are required to be attested, oaths will not be administered.

(b) A petition for reconsideration of an order of the Motor Carrier Board, the Operations Boards, the Special Permission Board, the Released Rates Board, or the Tariff Rules Board may be filed by any interested person.

(c) A petition for reconsideration of a Finance Board decision may be filed only by a party to the proceeding.

(d) A petition for reconsideration pursuant to paragraphs (b) and (c) of this section and reply thereto will be governed by the Commission's rules of practice, except as provided in paragraph (e), (f), and (g) of this section.

(e) The original and six copies of every pleading, document, or paper permitted or required to be filed under this section, shall be furnished for the use of the Commission.

(f) A petition seeking reconsideration of an order of the Motor Carrier Board entered under section 210a(a) or 311(b) of the act must be filed within 20 days after the date of service of the order. Within 20 days after the filing of such petition with the Commission any interested person may file and serve a reply thereto.

(g) A petition seeking reconsideration of an affirmative order of the Motor Carrier Board entered pursuant to the rules and regulations governing transfers of property brokers' licenses, past 1045 of this chapter, passenger brokers' licenses, part 1133 of this chapter, motor carrier operating rights, part 1132 of this chapter, water carrier operating rights, part 1141 of this chapter, and freight forwarder permits, part 1151 of this chapter, must be filed within 20 days following publication of a synopsis of such order in the Federal Register. In such a petition the matters claimed to have been erroneously decided and the alleged errors must be specified with particularity. If the petition contains a request for oral hearing, the request shall be supported by an explanation as to why the evidence sought to be presented cannot reasonably be submitted in affadivit form. Within 20 days after the final date for filing of such petitions with the Commission, any interested person may file and serve a reply thereto.

(h) *Service; special permission applications.*—Every application requesting authority to change, cancel, or reissue a tariff matter under suspension or continued in effect as a result of suspension shall include a certificate showing simultaneous service thereof upon all parties to the investigation and suspension proceeding. Service shall be made in the manner specified in rule 20(a) of this part. Notification of the action taken by the Special Permission Board will be given to all parties of record.

§1100.240 ***Rules governing applications by motor carriers of property or passengers under sections 5(2) and 210a(b) of the Interstate Commerce Act.***

(a) *Scope of rules.*—These rules govern the filing and handling of (1) applications under section 5(2) of the act respecting control, lease, and unification of operating rights and properties of motor carriers of property or passengers, and (2) applications for approval under section 210a(b) of the act of the temporary operation of motor carrier properties sought to be acquired in an application under section 5(2) of the act. Except as otherwise herein provided, the rules of general applicability shall govern.

(b) *Notice.*—(1) Notice of the filing of applications under section 5(2) will be given by the publication of a summary of the authority sought in the Federal Register. The summary will be prepared by the applicant, and the Commission will advise the applicant if the summary, in its view, does not properly describe the transaction.

(2) If applicants propose that any portion of the operating rights involved in the transaction be canceled or restricted, such proposal will be included in the summary.

(3) The summary will state whether an application has or has not been filed for temporary authority under section 210a(b) of the act.

(4) No notice by applicants to interested persons is required, except that applicants are not relieved from the obligation to file copies of applications with Governors, State Boards, and Regional Directors of the Commission's Bureau of Operations as may be required by the prescribed form of application, and except as hereinafter provided in paragraph (d)(3) of this section.

(5) Except for good cause shown, amendments to applications which broaden the scope of the proposed transaction will not be allowed if tendered after notice of the filing of an application has been published in the Federal Register. Restrictive amendments may be submitted at any time, but if tendered after such publication, they may be allowed only in the discretion of the Commission, or by the hearing officer if the matter is assigned for hearing or prehearing conference.

(c) *Protests and request for hearing under section 5(2).*—(1) Protests to the granting of an application under section 5(2) of the act shall be filed with the Commission within 30 days after the date notice of the filing of the application is published in the Federal Register. A protest filed under these rules shall be served upon applicants' representatives named in the notice of filing published in the Federal Register. Unless otherwise specified in the notice, the original and one copy of the protest shall be filed with the Commission. Protests not in reasonable compliance with the requirements of this section may be rejected in the discretion of the Commission.

(2) Failure seasonably to file a protest will be construed as a waiver of opposition and participation in the proceeding.

(3) A protest against an application shall set forth specifically the grounds upon which it is made and the protestant's interest in the proceeding, shall request an oral hearing if one is desired, and shall specify with particularity the facts, matters and things relied upon, but shall not include issues or allegations phrased generally.

(4) Any request for an oral hearing shall be supported by a specific explanation as to why the evidence to be presented cannot reasonably be submitted in the form of affadivits, and shall set forth the approximate number of witnesses who would be presented by the protestant, an estimate of the hearing time required for such presentation, and whether a hearing at Washington, D.C., would be objectionable, and, if so, what place would be more suitable; and protestant shall certify in its protest that, if an oral hearing is held, it will appear and present evidence.

(5) Where a person has a limited interest in an application, which possibly could be eliminated by a restrictive amendment of the proposed transaction, such person may also include in a protest filed in conformity with this paragraph an offer to withdraw the protest in the event of acceptance of such amendment by applicants and the Commission.

(6) Except as provided in subparagraph (5) of this paragraph, or for good cause shown, the failure of any person filing a protest to an application to appear at a hearing scheduled thereon shall be construed as a waiver of his right to participate further in the proceeding, and such person and any representative responsible for his participation in the proceeding may be subject to censure for failure to appear.

(7) Any interested person, not a protestant, desiring to receive notice of the time and place of any hearing, conference, or other proceedings shall notify the Commission by telegram or letter within 30 days from the date of the publication of the notice of the filing of the application in the Federal Register.

(d) ***Procedure to be followed under section 210a(b).***—(1) Subject to subparagraph (4) of this paragraph, protests to the granting of an application for temporary authority under section 210a(b) may be filed by persons who oppose, or intend seasonably to oppose, the application under section 5(2).

(2) The protest to temporary approval may be by telegram, letter, or other writing, of which only an original need be filed, or may be included in a protest filed under paragraph (c) of this section. It should state the interest of the protestant and the grounds for the position taken in opposition to temporary approval, and should show service upon applicants' representatives.

(3) If an application for temporary authority is filed in a contested proceeding after the period for filing protests under paragraph (c) of this section has expired, applicants are required to furnish copies of such application to protestants. Notice will not thereafter be given by publication in the Federal Register.

(4) Applications for temporary authority under section 210a(b) will be disposed of without hearings or other proceedings, and without necessarily awaiting expiration of the period allowed for protests. If the application for temporary authority is filed within 30 days after the date of initial publication; or, if the application for temporary authority is filed after expiration of the 30 days from the date of initial publication of notice of the section 5 application, and protests have been filed, copies of the temporary authority application shall be served on protestants, and action will not be taken in less than 20 days from the date of such service, unless circumstances require immediate action.

(e) *Hearing or other procedures under section 5(2).*—(1) The Commission will determine whether an assignment for oral hearing should be made, after notice to interested persons of the filing of the application has been published in the Federal Register and the period for filing protests has expired. At or prior to such time, applicants who do not intend to prosecute their application should promptly request dismissal thereof.

(2) Applicants who believe their application is not susceptible of handling without oral hearing may request oral hearing when the application is filed, or later, if additional evidence which cannot reasonably be submitted in the form of affidavits is required.

(3) If applicants request an oral hearing and show that such hearing is necessary, or if the proceeding is contested, applicants shall advise the approximate number of witnesses who will be presented, furnish an estimate of the hearing time required for such presentation, and state whether a hearing at Washington, D.C., would be objectionable, and, if so, what place would be more suitable.

(f) *Notice of hearing, conference or other proceedings.*—(1) Notice of the time and place of any hearing, conference, or other proceedings will be given to applicants' representatives, applicants, protestants, and other interested parties by mailing to them the order or notice assigning the application for hearing, conference, or other procedure.

(2) A request by any party for a change in the time or place of an assigned hearing must set forth good and sufficient cause for the action requested, must be in writing and filed with the Commission not less than 10 days before the assigned hearing date, except in emergency circumstances, and must be served on all known parties of record at the same time and by the same method of communication as service is made on the Commission. Where such requests are filed less than 10 days before the date of hearing, the petitioning party shall state the reasons for his failure to make such request within the prescribed time.

(3) The applicants' representatives, protestants, and those who request notice of changes in time or place of hearing, conference, or other proceedings will be informed of such changes if notice is given by mail. If telegraphic notice becomes necessary, notice of such changes will be given by telegram only to those who request telegraphic notice at their expense.

(4) Upon receipt of an order or notice of a hearing assignment, applicants who no longer intend to proceed to hearing shall immediately and jointly request dismissal of their application, with appropriate notification to all protestants, failing which applicants or their representatives, or both, may be subject to censure.

(g) *Intervention.*—Rule 71 relating to participation without intervention is inapplicable to applications subject to this section. No person who fails to file a protest as provided in these rules will be permitted to intervene in opposition except upon a showing of substantial reasons in a petition submitted in accordance with rule 70.

§1100.245 *Rules governing the issuance of Certificates of Registration under section 206(a) of the act.*

(a) Scope of rules.—These rules govern (1) the matter of giving notice to interested persons, by publication in the Federal Register, of the filing of applications for State certificates of public convenience and necessity authorizing motor common carrier operations in the transportation of property or passengers in intrastate commerce, in connection with which the applicant, also desires to engage in transportation in

interstate and foreign commerce under the provisions of section 206(a)(6) of the act, and certain related matters.

(2) The filing with the Interstate Commerce Commission of applications for Certificates of Registration based upon intrastate certificates of public convenience and necessity issued by a State Commission which contain a concurrent finding that the public convenience and necessity require operations in interstate and foreign commerce in accordance with the provisions of section 206(a)(6) of the act.

(3) The filing with, and the handling by, the Interstate Commerce Commission of petitions for reconsideration of the decisions of State Commissions, made pursuant to the provisions of section 206(a)(6) of the act, finding that the public convenience and necessity require motor common carrier operations in the transportation of property or passengers, in interstate and foreign commere, which do not exceed the scope of the concurrently authorized motor common carrier operations in intrastate commerce contained in certificates of public convenience and necessity issued by such State Commissions. Except as otherwise herein provided, the rules of general applicability shall govern.

(b) *Notice to interested persons of the filing of State applications.*—In accordance with such rules and regulations as may be prescribed by the State Commission, any persons seeking an intrastate certificate of public convenience and necessity, who or which also desires to engage in transportation in interstate and foreign commerce pursuant to section 206(a)(6) of the act, shall so notify the State Commission with which the intrastate application is filed at the time of filing the intrastate application. Notice to interested persons of the filing of such an application, and of the applicant's desire also to engage in transportation in interstate and foreign commerce, shall be given by the publication in the Federal Register of a summary of the authority sought as prepared by the State Commission and transmitted to the Interstate Commerce Commission at Washington, D.C. (See approved Form No. 7 in appendix B.) In order to afford interested persons a reasonable opportunity to be heard, such summaries must be forwarded to the Interstate Commerce Commission sufficiently in advance of any hearings that may be scheduled on the application so noticed. Except as otherwise may be required by the State Commission, no other notice by applicant to interested persons is necessary.

(c) *Conduct of, and participation in, State Commission application proceedings.*—Subject to the requirement of section 206(a)(6) of the act, that interested persons be afforded a reasonable opportunity to be heard, the rules and regulations of the State Commission with which the intrastate application is filed shall govern the conduct of, and participation in, any State hearings or other State Commission proceedings that may be held with respect to such application, notice of the filing of which has been published in the Federal Register pursuant to paragraph (b) of this section. Protests and request for information concerning the time and place of State Commission hearings or other proceedings, any subsequent changes therein, and any other related matters shall be directed to the State Commission with which the application is filed and shall not be addressed to or filed with the Interstate Commerce Commission. The record made in the State Commission proceeding shall be made available to the parties to such proceeding upon payment of such costs as may be fixed or prescribed by the State Commission.

(d) *Applications to the Interstate Commerce Commission for Certificates of Registration.*—(1) Within 30 days after service by the State Commission of a certificate of public convenience and necessity authorizing motor common carrier operations in intrastate commerce and containing the recitations required by section 206(a)(6) of the act, the holder of such State certificate shall file with the Interstate Commerce Commission at Washington, D.C., and Application for Motor Carrier Certificate of Registration, Form BOR-100, §1003.1 of this chapter. Such application shall be prepared in accordance with and contain all information called for in the form of application and the instructions thereto. Copies of such application shall be furnished in such number, and be filed and served in the manner and upon the persons specified in the form of application.

(2) Upon receipt, an application for a Certificate of Registration will be assigned a docket number; and thereafter notice of the date of filing of the application and the docket number assigned thereto will be transmitted by the Interstate Commerce Commission to the applicant and those persons upon whom copies of the application were served by the applicant as specified in the form of application; and thenceforth all further proceedings therein before the Interstate Commerce Commission will be under such docket designation.

(3) Any party in interest, who or which opposed in the State Commission proceeding the authorization of operations in interstate or foreign commerce, shall be deemed to be a party in the corresponding application proceeding instituted in accordance with subparagraph (1) of this paragraph. No other person will be permitted to participate in such proceeding except upon a showing of substantial reasons in a petition submitted inaccordance with rule 70 of the Commission's rules of practice

(4) Except for good cause shown, and upon leave granted, failure to file an application for a Certificate of Registration within the 30-day time period specified in subparagraph (1) of this paragraph shall be construed as a waiver of any right thereafter to file for and obtain such a certificate.

(e) *Petitions for reconsideration of State Commission decisions made the subject of applications for Cerfificates of Registration.*—(1) Parties. Any party in interest, who or which opposed in the State Commission proceeding the authorization of operations in interstate or foreign commerce, may file with the Interstate Commerce Commission at Washington, D.C., a petition seeking reconsideration of the State Commission decision which is the basis for an application for a Certificate of Registration.

(i) The original and six copies of every pleading, document, or paper permitted or required to be filed under this section, shall be furnished for the use of the Commission.

(ii) A petition seeking reconsideration of an order of the Motor Carrier Board entered under section 210a(a) or 311(b) of the act must be filed within 20 days after the date of service of the order. Within 20 days after the filing of such petition with the Commission any interested person may file and serve a reply thereto.

(iii) A petition seeking reconsideration of an affirmative order of the Motor Carrier Board entered pursuant to the rules and regulations governing transfers of property brokers' licenses, part 1045 of this chapter, passenger brokers' licenses, part 1133 of this chapter, motor carrier operating rights, part 1132 of this chapter, water carrier operating rights, part 1141 of this chapter, and freight forwarder permits, part 1151 of this chapter, must be filed within 20 days following publication of a synopsis of such order in the Federal Register. In such a petition the matters claimed to have been erroneously decided and the alleged errors must be specified with particularity. If the petition contains a request for oral hearing, the request shall be supported by an explanation as to why the evidence sought to be presented cannot reasonably be submitted in affidavit form. Within 20 days after the final date for filing of such petitions with the Commission, any interested person may file and serve a reply thereto.

(iv) Every application requesting authority to change, cancel, or reissue a tariff matter under suspension or continue in effect as a result of suspension shall include a certificate showing simultaneous service thereof upon all parties to the investigation and suspension proceeding. Service shall be made in the manner specified in rule 20 of subpart A.

(2) *Filing requirements.*—Except for good cause shown, and upon leave granted, petitions under this rule shall be filed within 30 days after the date of the filing of an application with the Interstate Commerce Commission pursuant to paragraph (d)(1) of this section for a Certificate of Registration authorizing motor common carrier operations in interstate and foreign commerce under the provisions of section 206(a)(6) of the act, and such petition shall be filed under the docket number assigned to the related application proceeding.

(3) ***Contents.***—Any such petition shall specify with particularity the facts, matters, and arguments relied upon; and unless a copy of such record already has been submitted by another petitoner, such petition shall be accompanied by a certified copy of the complete record made before the State Commission, including a transcript of any testimony taken and any exhibits filed before such State Commission, such copy to be provided by, and at the expense of, the petitioner. The petition shall conform in all respects to requirement of rules 13 and 15 of this Commission's rules of practice. The original and six copies of the petition, and one certified copy of the record made before the State Commission, shall be furnished for the use of the Interstate Commerce Commission.

(4) ***Replies to petitions.***—A reply to a petition filed under these rules may be filed and served within 20 days after the final date for filing such petitions. The original and six copies of the reply shall be finished for the use of the Interstate Commerce Commission.

(5) ***Service of petitions and replies.***—Copies of each petition and reply filed under these rules shall be served on the State Commission involved and on all other parties to the State Commission proceeding in accordance with the requirements of rule 20 of the Commission's rules of practice.

(6) ***Effect of petitions.***—The filing under these rules of a petition for reconsideration shall not preclude or affect the institution of the motor carrier operations in intrastate commerce authorized by the State certificate; and failure seasonably to file a petition for reconsideration under these rules will be construed as a waiver of opposition and further participation in the related application proceeding for a Certificate of Registration.

(f) ***Disposition of applications for Certificates of Registration and related petitions for reconsideration.***—Applications for Certificates of Registration and related petitions for reconsideration filed under these rules will be handled together and processed in a single proceeding and will be disposed of by the division of the Interstate Commerce Commission to which these matters may be assigned, Acting as an Appellate Division. Except as the Interstate Commerce Commission may, in its discretion, otherwise direct, a dicision and order issued by the Appellate Division disposing of such an application and petition will be administratively final and petitions by any of the parties for reconsideration of such Division's actions will not be entertained.

(g) ***Disposition of unopposed applications for Certificates of Registration.***—Where the State Commission proceeding which resulted in the issuance of the State certificate sought to be made the basis of a Certificate of Registration was unopposed, or where petitions for reconsideration of the finding of the State Commission that the public convenience and necessity require operations in interstate and foreign commerce are not seasonably filed, the application for a Certificate of Registration will be disposed of in the most expeditious manner and, so far as practicable and legally permissible, without formal hearings or other proceedings.

§1100.246 ***Rules pertaining to proceedings for the discontinuance or change of train or ferry service.***

(a) *Scope of special rules.*—These special rules govern procedure before the Commission in proceedings commenced by carriers subject to part I of the Interstate Commerce Act, under and pursuant to the provisions of section 13a of said act, upon a notice under paragraph (1) of said section or by a petition under paragraph (2) thereof, with respect to a proposed discontinuance to change, in whole or in part, of the operation or service of any train or ferry.

(b) *General rules otherwise applicable.*—Except as provided otherwise in these special rules, proceedings upon notices and petitions filed under section 13a shall be governed by the rules of general applicability.

(c) *Notices and petitions by carriers.*—A notice filed under paragraph (1), and a petition under paragraph (2), of said section 13a shall be prepared in accordance with and contain the information called for by rules and regulations then in force with respect to such a notice or petition. See part 1122 of this chapter.

(d) *Notice to interested parties.*—Notice of the institution of any investigation or of the time and place of any hearing, conference, or other proceeding will be given by the Commission to the carrier or carriers involved, the Governor and appropriate regulatory agency of each State in which the train or ferry affected is operated, protestants, and other interested parties of record, by mailing to them the order or notice instituting the investigation or assigning the hearing, conference, or other proceeding. Similar notice will be given to the same parties of changes in the time or place of hearing, conference, or other proceeding when time permits notice by mail; but, if telegraphic notice becomes necessary, notice of such changes will be given by telegram only to those who have requested telegraphic notice at their expense.

(e) *Participation at hearings without intervention.*—In an investigation proceeding under section 13a(1), or in proceedings upon a petition filed under section 13a(2), an appearance may be entered at the hearing without filing a petition in intervention or other pleading, if there is full disclosure of the identity of the person or persons in whose behalf the appearance is to be entered, if the interest of such person in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented. A person in whose behalf an appearance is entered in this manner becomes a party to the proceeding.

(f) *Complaints and protests.*—When a notice is filed with the Commission pursuant to section 13a(1), proposing to discontinue or change, in whole or in part, the operation or service of any train or ferry between a point in one State and a point in any other State or in the District of Columbia, any interested person opposed to such proposal may file with the Commission a complaint or protest by telegram, letter, or other writing, of which only an original need be filed. Service thereof upon the carrier proposing the discontinuance or change is not required. A complaint or protest should identify the carrier and the particular train or ferry involved, and should state the interest of the complainant or protestant and the grounds for the opposition. The complaint or protest must be filed with the Commission in Washington, D.C., not later than 15 days before the date when the carrier proposes to make effective the discontinuance or change. The failure to reply will not be construed as an admission of any allegations contained in the protest or complaint.

(g) *Petitions for reconsideration of orders instituting an investigation.*—Petitions for reconsideration of an order instituting an investigation in relation to a proposed change or discontinuance may be filed by the carrier or carriers affected within 15 days after the date of service of the order. An original and six copies shall be furnished for the use of the Commission, and copies thereof shall be served upon the persons to whom copies of the notice of the carrier were required to be mailed by the rules and regulations prescribed by the Commission. See section 1122.5 of this chapter. Any interested person may file and serve a reply to any petition for reconsideration permitted under this paragraph within 15 days after the filing of such petition with the Commission.

(h) *Reconsideration of decision not to insitute an investigation.*—A decision not to institute an investigation concerning a proposed discontinuance or change of service may be made the subject of a petition for reconsideration by any interested person, provided the petition reaches the Commission at least 2 workdays prior to the effective date of the proposed discontinuance or change of service. If an order is desired requiring continuance of the service pending hearing and decision upon investigation, the petition should reach the Commission at least 12 days before the discontinuance or change is scheduled to become effective. (Under section 13a(1) of the act, an order of the Commission requiring continuance of the operation or service, pending hearing and decision in an investigation, must be served upon the carrier or carriers affected thereby at least 10 days before a discontinuance or change would otherwise become effective.) For the purposes of this section, a workday shall be considered any day except Saturday, Sunday, or a legal holiday in the District of Columbia. (A legal holiday of less than 1 day shall be considered a workday within the meaning of this section.) Petitions submitted under this paragraph shall be filed with the Secretary of the Commission by 4 p.m., United States Standard Time (or by 4 p.m. Local Daylight Saving Time if that time is observed in the District of Columbia). Written or telegraphic communication in intelligible form requesting reconsideration will be sufficient. The request for reconsideration shall contain the following prefatory statement: "This matter requires expedited handling under Rule 246 of the Commission's rules of practice." If in writing, an original and six copies of the petition shall be furnished for the use of the Commission. Telegraphic notice or its equivalent must be given by the petitioner to the carrier or carriers affected, and certification that such notice has been given must accompany the request for reconsideration. Action may be taken upon the petition without awaiting a reply, but if a reply is received prior to a decision upon the petition it will be given consideration. A petition not timely filed will be rejected by the Secretary.

(i) *Protests.*—Section 13a(2) requires this Commission to conduct a full hearing in the State involved, before it may grant a petition filed thereunder for authority to discontinue or change the operation or service of any train or ferry operated wholly within the boundaries of that State. It is not necessary, therefore, that persons opposed to such a petition file a protest in order to obtain a hearing; but interested persons may file protests by complying with rule 38 or they may register their opposition by letter addressed to the Secretary, Interstate Commerce Commission, Washington, D.C. 20423, for the purpose of receiving notice of the time and place of the hearing. See paragraph (e) of this section in regard to participation at hearing.

§1100.247 ***Special rules governing notice of filing of applications by motor carriers of property or passengers and brokers under sections 206 (except section 206(a)(6) relating to Certificate of Registration), 209 and 211, by water carriers under sections 302(e), 303, and 309, and by freight forwarders under section 410 of the Interstate Commerce Act, and certain other procedural matters with respect thereto. (Rule 247).***

(a) *Scope and applicability of special rules.*—(1) Scope.—These special rules govern the filing and handling pursuant to the provisions of the Interstate Commerce Act of (i) applications for certificates, permits, and licenses respecting the transportation of property of passengers under sections 206 (except section 206(a)(6) relating to Certificates of Registration), 209, and 211, (ii) applications for certificates, permits, and exemptions respecting the water transportation of property or passengers under sections 302(e), 303, and 309, and (iii) applications for permits to operate as freight forwarders and for certificates of abandonment under section 410. Except as otherwise herein provided, the general rules of practice shall apply.

(2) *Applicability.*—Except as otherwise provided herein these special rules shall apply to all applications enumerated in subparagraph (1) of this paragraph and filed with the Commission on and after April 5, 1977, and to such of those applications filed prior to that time as the Commission may designate by appropriate publication in the Federal Register.

(b) *Applications.*—(1) *Form and content.*—An application filed with the Commission under these special rules shall be prepared in accordance with and contain the information called for in the form of application prescribed by the Commission or in instructions which may have been issued by the Commission with respect to the filing of such an application. An application for a certificate, permit, or license as defined in subparagraph (a)(1) shall be accompanied by (i) certifications of support on the prescribed form for each individual, corporation, or partnership known to the applicant upon whose support applicant intends to rely, and (ii) a caption summary of the authority sought for publication in the Federal Register, which summary shall be prepared in accordance with the instructions accompanying the application form. No application will be accepted for filing unless it is accompanied by certifications of support (when necessary) as herein required and by a caption summary of the authority sought. Upon request by any party, the applicant shall furnish such party with copies of all certifications filed with the application. If, subsequent to the filing of an application, additional witnesses become known to the applicant, applicant shall file a certification for each such witness with the Commission and shall concurrently serve copies thereof upon all parties of record. The total number of witnesses subject to this rule whose testimony is offered in support of the application may not exceed twice the number for whom certifications were filed with the application, whether the case is designated for oral hearing or for modified procedure. In cases designated for oral hearing, certifications of additional witnesses as provided above must be filed and served not later than 30 days prior to the date assigned for commencement of hearing: Provided, That, the presiding officer may authorize additional certifications for witnesses to be presented at a continued hearing to be filed and served not later than 30 days prior to the date of the continued hearing. No testimony will be received from witnesses for whom such certifications have not been timely received. Provided, however, that the provisions of this paragraph limiting the total number of witnesses and requiring certifications for subsequently discovered witnesses shall not be applicable to applications to transport passengers, and that certifications for subsequently discovered witnesses shall not be required in cases handled under modified procedure except when reassigned for oral hearing.

(2) *Copies and service.*—Copies of an application filed under these special rules shall be furnished in such number and shall be filed and served in the manner and upon the persons specified in the form or instructions.

(3) *Requests for handling applications under either oral hearing or modified procedure.*—An applicant who believes its application is susceptible for handling without oral hearing may request such handling when the application is filed.

(c) *Notice to interested persons.*—Notice of the filing of applications to competitors and other interested persons will be given by the publication in the Federal Register of a caption summary of the authority sought. Such caption summaries will be prepared by the applicant in accordance with the prescribed format and instructions in the application, which summaries will be reviewed by the Commission before submittal to the Federal Register. Incomplete or incorrect captions may result in rejection of the application. After the caption summary appears in the Federal Register, it shall be the responsibility of applicant promptly to advise the Commission if the summary does not properly describe the authority sought and submit a corrected Federal Register caption summary (not to expand the application). No other notice by applicants to interested persons is required, except that applicants are not relieved from the obligation to file copies of applications with Governors, State boards, and regional directors of the Commission's Bureau of Operations as may be required by the prescribed form of the application.

(d) *Amendments.*—Except for good cause shown, amendments to applications which broaden the scope of the proposed operations will not be allowed if tendered after notice of the filing of an application has been published in the Federal Register.

Restrictive amendments acceptable to the Commission may be submitted at any time: Provided, That, except as hereinafter provided, in cases assigned for oral hearing, amendments must be received by the Commission not later than (1) 30 days after the service date of a notice that the case has been assigned for oral hearing, or (2) the date of prehearing conference assigned to consider such amendments. Restrictive amendments submitted after such date may be considered by the Commission or presiding officer only if exceptional reason is shown why the amendment could not have been timely filed. Prehearing conference assigned for the consideration of amendments shall be subject to the provisions of subparagraph (e)(6) of this rule respecting appearance at hearings.

(e) *Protests and request for hearing.*—(1) Protests to the granting of an application shall be filed with the Commission within 30 days after the date notice of the filing of the application is published in the Federal Register. A protest filed under these rules shall certify that it has been served upon applicant's representative (or applicant, if no practitioner representing him is named in the notice of filing published in the Federal Register). Unless otherwise specified in the published notice, the original and one copy of the protest shall be filed with the Commission. Protests not in reasonable compliance with the requirements of these rules may be rejected in the discretion of the Commission.

(2) Failure seasonably to file a protest will be construed as a waiver of opposition and participation in the proceeding.

(3) A protest against any application shall set forth specifically the grounds upon which it is made and contain a detailed statement of the protestant's interest in the proceeding (including a copy of only the specific portions of its pertinent authority

and including direct operations held by virtue of the gateway elimination regulations either published in the Federal Register as letter-notices or granted in separate gateway elimination certificates, which protestant believes to be in conflict with that sought in the application, and describing in detail the method (whether by joinder, interline, or other means) by which protestant would use such authority to provide all or part of the service proposed), shall request an oral hearing if one is desired, and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally. Protestants shall name the carrier(s) with whom interline operations shall be performed thereunder. Protests phrased in general terms and not complying with these specifications may be rejected.

(4) Any request for an oral hearing shall be supported by a specific explanation as to why the evidence to be presented cannot reasonably be submitted in the form of affidavits, shall set forth the number of witnesses which would be presented by the protestant and an estimate of the hearing time required for such presentation, and shall contain the following certification without further qualification: The undersigned hereby certifies that, if an oral hearing is held, protestant(s) will appear and present evidence of protestant(s) own operations and particular interest(s) in the outcome of this application unless this application is amended so as to eliminate the interest(s) of protestant(s) as set forth in this protest.

(5) Where a person has a limited interest in an application, which possible could be eliminated by a restrictive amendment to the application, which amendment must be acceptable to the Commission, it may also include in a protest filed in conformity with this paragraph an offer to withdraw the protest in the event of acceptance by applicant and the Commission of such amendment.

(6) Except where a restrictive amendment has been made as provided in subparagraph (5) of this paragraph, or for good cause shown, the failure of any person filing a protest to an application to appear at a hearing scheduled thereon shall be construed as a waiver of its right to participate further in the proceeding, and it and any representative responsible for its participating in the proceeding may be subject to censure for failure to appear. In addition, the mere appearance of protestant without the presentation of evidence of protestant's own operations and particular interest in the application may, in the absence of good cause shown, subject protestant and its representative to similar censure.

(7) An interested person, not a protestant, desiring to receive notice of the time and place of any hearing, conference, or other proceedings shall notify the Commission by telegram or letter (original and one copy) within 30 days from the date of the publication of the notice of the filing of the application in the Federal Register.

(8) A person (carrier) who does not file a protest as required by the regulations in this part, or who otherwise fails to remain a proper party to an application proceeding filed under the regulations in this part (by withdrawal of a previously filed protest, by failure to file verified statements in opposition, by failure to appear at a scheduled oral hearing, or by other means), and who is not granted leave to intervene pursuant to the provisions of paragraph (i) of this section, except for good cause shown, may not personally, or through a representative, appear as a witness for a party protestant, except as provided hereafter. This provision shall not preclude the filing of a proper joint protest on behalf of several opposing carriers, or the presentation of evidence of service by bona fide connecting carriers through a duly qualified protestant, as to the nature and extent of their joint services, or other probative evidence, provided the party protestant's original protest contains a clear statement that its opposition is based, in part at least, upon a transportation service performed by it jointly with connecting carrier and fully complies with Special Rule 247(e)(3).

(f) *Hearing or other procedures to be followed.*—(1) Determination.—The Commission will determine whether an assignment for oral hearing should be made, at a time after notice to interested persons of the filing of the application has been published in the Federal Register and the period for filing protests has expired. At or prior to such time, any applicant who does not intend to prosecute its application should promptly request dismissal thereof.

(2) *Uncontested proceedings.*—Proceedings in which no protests are filed within 30 days after publication of notice in the Federal Register, and which are not assigned for oral hearing, will be determined on the basis of verified statements submitted by applicant, in accordance with the format provisions of Special Rule 247(f)(3).

(3) *Contested proceedings.*—In those contested proceedings in which the Commission determines that assignment of an application for oral hearing is unnecessary, thereafter the procedure shall be in accordance with rules 43(b), 44(b), and 45-52, inclusive, of the General Rules of Practice, except that: (1) only the original and one copy of any statement made pursuant to rule 49 need be filed with the Commission, and (2) that the statements to be submitted under rule 47 shall follow the format which is enumerated immediately below. The verified statements to be submitted by applicant (including those of supporting parties) and by protestants under Special Rule 247 shall be prepared in separately numbered and titled paragraphs so as to present the evidence in accordance with the format described immediately hereafter (and in appropriate appendixes as needed). All other contested proceedings which are subject to these rules will be assigned for oral hearing unless other procedures are ordered.

VERIFIED STATEMENT OF APPLICANT

I. Legal name and domicile of carrier.
II. Identity and qualifications of testifying witness.
III. Authority sought.
IV. (A) General scope of presently authorized operations (attach copies of pertinent operating rights).
  (B) Duplicating authority resulting from grant of application.
  (C) Dual operations resulting from grant of application.
  (D) Affiliation with other carriers and persons affiliated with carriers (indicate pertinent MC numbers and docket numbers of finance proceedings; indentify common and contract carriers as such).
V. Pertinent terminal facilities and communications network.
VI. Pertinent equipment.
VII. Safety program.
VIII. Service now provided to supporting witnesses.
IX. Type of service offered (*e.g.*, LTL, bulk, multiple delivery, et cetera).
X. Financial data (current balance sheet and income statement).
XI. Feasibility of operation; environmental impact.
XII. Any other information deemed pertinent by the witness.
XIII. Argument.
XIV. Verification.

VERIFIED STATEMENT IN SUPPORT OF APPLICATION

I. Legal name and domicile of supporting party of firm.
II. Identity and qualifications of testifying witness.
III. General description of supporting party and/or operations.
IV. Specific description of commodities applied for.
V. Volume and frequency of traffic (poundage, truckloads, et cetera).
VI. Amount of traffic to be tendered applicant.
VII. Specific and/or representative origins and destinations.
VIII. How the traffic now moves.
IX. Existing services and deficiencies.
X. Type of service required (bulk, LTL, multiple delivery, et cetera).
XI. Similar applications supported (pertinent docket numbers).
XII. Any other information deemed pertinent by the witness.
XIII. Argument.
XIV. Verification.

VERIFIED STATEMENT OF PROTESTANT

I. Legal name and domicile.
II. Identity and qualification of testifying witness.
III. Specific pertinent conflicting authority.
IV. Pertinent terminals and communications network.
V. Pertinent equipment.
VI. Type of service offered (LTL, bulk, interline, et cetera).
VII. Traffic subject to diversion if application granted.
    (a) service provided for supporting party or firm.
    (b) service provided for other parties within scope of application.
VIII. Any other information deemed pertinent by the witness.
IX. Argument.
X. Verification and certificate of service.

Requests for extension or modification of the time limits within which these statements are due to be filed (or as enumerated in rule 49 of the General Rules of Practice, 49 CFR 1100.49) will be granted only in the most extraordinary circumstances.

(g) *Failure to prosecute applications.*—An applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. Failure to prosecute an application under procedures ordered by the Commission will result in dismissal thereof. Submission of a request for dismissal of an application later than 15 calendar days after the service date of a notice setting it for oral hearing, or failure by applicant to appear and prosecute the application at such hearing will result in dismissal thereof and will bar the filing of any application for the same or any part of the same authority by the same applicant for a period of 1 year after the date of the dismissal order except upon a petition showing good cause why this rule should be waived. Such petition shall be served upon all protestants to the prior application.

(h) *Notice of hearing, conference, or other proceedings.*—(1) Initial assignment.—Notice of the time and place of any hearing, conference, or other proceedings will be given to applicant's representative, applicant, protestants, and other interested parties by mailing to them the order or notice assigning the application for hearing, conference, or other procedure.

(2) *Assignment of an application for hearing concurrently with notice of its filing.*—For the convenience of the Commission in handling applications related to one or more applications which already have been noticed in the Federal Register when, in the Commission's discretion, the public interest would be served, an application may be concurrently noticed and assigned for hearing provided appropriate publication in the Federal Register can be made at least 1 week prior to the assigned date of hearing. Where such action is taken, and regardless of any prior publication of the application, any interested person may, without filing a protest prior to the assigned hearing, appear at the hearing in opposition to the application so assigned and become a party and be entitled to participate in that proceeding.

(3) *Request for change.*—A request by any party for a change in the time or place of an assigned hearing must set forth good and sufficient cause for the action requested, must be in writing and filed with the Commission not less than 10 days before the assigned hearing date, except in emergency circumstances, and must be served on all known parties of record at the same time and by the same method of communication as service is made on the Commission. Where such requests are filed less than 10 days before the date of hearing, the petitioning party shall state the reasons for his failure to make such request within the prescribed 10 days.

(4) *Notice of changes.*—The applicant's representative (or applicant if it has no representative), protestants, and those who request notice of changes in time or place of hearing, conference, or other proceeding will be informed of such changes if notice is given by mail. If telegraphic notice becomes necessary, notice of such changes will be given by telegram only to those who request telegraphic notice at their expense.

(i) *Intervention.*—Rule 71 relating to participation without intervention is inapplicable to applications subject to this section, except with respect to those persons seeking to intervene in support. No person who fails to file a protest as provided in these rules will be permitted to intervene in opposition in a proceeding except upon a showing of substantial reasons in a petition submitted in accordance with rule 70.

(j) *Drafting of recommended order and report by prevailing party.*—Applications in which oral hearing are held and in which the hearing officer can announce his decision, either (1) on the record after the close of the taking of testimony, or (2) by appropriate notification to the parties after the filing of briefs, may be made the subject of an initial decision prepared by the party or parties in whose favor the hearing officer decides, within a period specified by the hearing officer. The hearing officer will make such changes as he considers appropriate in the draft prepared for him.

The following language is to be added to the instruction to each respective form.[1]

Special Rule 247(b)(1) of the Commission's General Rules of Practice has been amended to provide for the mandatory filing with the application of the certifications of support, and a caption summary of the authority sought for publication in the Federal Register. Applications not accompanied by a properly completed caption summary of the authority sought will not be accepted for filing.

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[1] The appendix at page 5 of forms OP-OR-11 and OP-FF-10 is renumbered page 6, respectively, and the above language is inserted and numbered page 5 in each form. The above language is added to page 5 of form OP-WC-20 and as page 6 of form OP-WC-10. Page 7 of form OP-OR-9 is deleted, and the above language is inserted and numbered page 7.

The caption summary shall be prepared in the general form described in appendix F to the report in Ex Parte No. 55 (Sub-No. 14), 125 M.C.C. 790 (1976). The docket number and filing date will be assigned when the application is accepted for filing by the Interstate Commerce Commission. Applicant shall print or type (single space) its name and trade name, if any, in uppercase above its address. Applicant shall print or type (single space) the name of its representative above the representative's address. The authority sought shall be described in a double spaced paragraph and the commodity description (except specified restrictions and exemptions) and the particular method of transportation involved (*e.g.*, common carrier, contract carrier, broker, or freight forwarder) shall be underlined.

Verified statements submitted in support of an application filed pursuant to Special Rule 247 shall be prepared in accordance with the format specifically described in Special Rule 247(f)(3). If, subsequent to the filing of an application, additional witnesses become known to the applicant, applicant shall file a certification for each such witness with the Commission and shall concurrently serve copies thereof upon all parties of record. The total number of witnesses whose testimony is offered in support of an application may not exceed twice the number for whom certifications were originally filed with the application. In cases designated for oral hearing, certifications of additional witnesses as provided above must be filed and served not later than 30 days prior to the date assigned for commencement of the hearing: Provided, That, the presiding officer may authorize additional certifications for witnesses to be presented at a continued hearing to be filed and served not later than 30 days prior to the date of the continued hearing. No testimony will be received from witnesses for whom such certifications have not been timely received. An applicant who believes its application is susceptible of handling without oral hearing may request such handling when the application is filed. Any request for an oral hearing shall be supported by a specific explanation as to why the evidence would be more amenable to presentation at oral hearing. Amendments to applications which broaden the scope of the proposed operations will not be allowed. Restrictive amendments acceptable to the Commission may be submitted at any time: Provided, That, except as hereinafter provided, in cases assigned for oral hearing amendments must be received by the Commission not later than (1) 30 days after the service date of a notice that the case has been assigned for oral hearing, or (2) the date of prehearing conference assigned to consider such amendments. Restrictive amendments submitted after such date may be considered by the Commission or presiding officer only if exceptional reason is shown why the amendment could not have been timely filed. Prehearing conferences assigned for the consideration of amendments shall be subject to the provisions of subparagraph (e)(6) of Special Rule 247 respecting appearance at hearings.

NOTE: Certifications of support are not applicable to the preparation of form OP-WC-10.

§1100.248 *Implementation of Public Law 91-375, Postal Reorganization Act (Motor Carrier Licensing Provisions).*

(a) *Scope of rules.*—These special rules govern the filing and handling of applications seeking the right to operate pursuant to either a Postal Certificate of Public Convenience and Necessity or a General Postal Certificate of Exemption authorizing operation, in interstate or foreign commerce, by motor vehicle in the transportation of mail.

(b) *Applications for postal certificates of public convenience and necessity.*—(1) The application form (OP-OR-10) shall be available from the Secretary, Interstate Commerce Commission, and shall be completed in duplicate, and transmitted to the Secretary, Interstate Commerce Commission, Washington, D.C. 20423, and a copy thereof shall be sent to the transportation regulatory commission (or, if none, the Governor) of each State within which operations are sought to be performed.

(2) Attached to the application shall be a true copy of applicant's contract with the Postal Service (or its predecessor Post Office Department), which contract must have been in force on the effective date of section 5215 of the Postal Act.

(3) If applicant is a successor in interest to a qualifying star route carrier, evidence of continuity of star route service and carrier identity must be furnished (this may be done in letter form duly sworn and notarized).

(4) The application form provides space for a description of the territory served by the applicant on or before the effective date of section 5215. Here applicant should describe the territorial extent of operations performed pursuant to its contract in force on the effective date, such description being in terms of the appropriate political division or subdivision (*i.e.*, State county, city, village, et cetera) within which service was authorized by contract. Authority may be granted only commensurate with the service covered by applicant's contract; therefore, applicants are cautioned to be specific in delineating the territory sought in order to avoid delays in processing their applications.

(5) Notice to the public of any such application will be made by publication in the Federal Register. Provision will be made for the filing of protests within 30 days from the date of publication, although it is not contemplated that protests will, in fact, be filed.

(6) Upon determination that an applicant is qualified to receive "grandfather" authority, and upon compliance by applicant with sections 215 and 221(c) of the Interstate Commerce Act, and with the rate-filing procedures established by this Commission, a Postal Certificate of Public Convenience and Necessity will be issued, authorizing the transportation of mail from, to, or between points in the involved territory.

(7) All further proceedings, including petitions for reconsideration, shall be handled in the manner specified in this Commission's rules of practice.

(c) *Applications for inclusion within general postal certificate of exemption.*—The class of carriers to which such certificate of exemption is applicable is defined as all star route, mail messenger and contract motor vehicle operators, whose for-hire motor carrier operations are confined to a single State, and who, on the effective date of section 5215 of the above-entitled Postal Act, hold a contract for the transportation of mail wholly within a single State. Upon submission to the Commission of a copy of such contract, the name of the carrier's representative to whom inquires may be made, and the carrier's written request therefore, such carrier shall be included within the terms of the general postal certificate of exemption which reads as follows: General Postal Certificate of Exemption, Designated Single-State Motor Carriers Affected By The Postal Reorganization Act (Public Law 91-375).

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 3d day of March 19[illegible].

After due investigation, it appearing that any motor carrier having complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and having complied with all the requirements established by this Commission in its report in Ex Parte No. MC-86, and lawfully engaging in operations solely within a single State in the Transportation of mail; that the transportation of mail in interstate or foreign commerce performed by him is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by this Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in the Interstate Commerce Act; that he, therefore, is entitled to inclusion within a general postal certificate of exemption in accordance with the provisions of section 204(a)(4a) of part II of said act; and this Commission so finding:

It is ordered, That the said motor carrier be, and it is hereby, granted this general postal certificate of exemption, which during the period it shall remain effective and unrevoked, shall exempt the said motor carrier from compliance with the provisions of part II of said act in respect of transportation of mail in interstate or foreign commerce, and it is hereby issued to said motor carrier.

It is further ordered, That this general postal certificate of exemption shall be effective from the date hereof and shall remain in effect until revoked in accordance with the provisions of said act.

§1100.249 *Special rules governing the filing of motor carrier mail transportation service orders or determinations under subsection (f) of section 5203 of title 39, United States Code 84 Stat. 768, 39 U.S.C. 5208.*

(a) *Definitions.*—For the purposes of this section the following words and terms, except as otherwise indicated in the context of this section, are to be construed as follows:

(1) "Postal Service" means the U.S. Postal Service, 39 U.S.C. 201.

(2) Whenever a "section" is cited, it refers to a provision of title 39, United States Code, as revised and reenacted.

(3) "Commission" means the Interstate Commerce Commission.

(4) "Motor carrier" or "carrier" means a common carrier by motor vehicle as defined in subsection (5) of section 5201 of title 39, United States Code, 39 U.S.C. 5201.

(b) *Applicability.*—The provisions of this section shall apply to all orders or determinations of the Postal Service under section 5203 (39 U.S.C. 5203) directing a motor carrier to transport mail.

(c) *Filing and content of orders or determinations.*—(1) *General.*—All orders or determinations shall be filed by the Postal Service with the Commission at its office in Washington, D.C., and shall conform to the provisions of subparagraphs (2) and (3) of this paragraph.

(2) *Content.*—Each order or determination of the Postal Service shall include: (i) The full and correct name and business address of the motor carrier, (ii) a description of the main transportation service required, (iii) a specification of the operating authority held by the carrier which corresponds to the mail transportation required, and (iv) a showing that the order or determination is consistent with orders of the Commission under sections 5207 and 5208 (39 U.S.C. 5207 and 5208), if any, or that the Postal Service and the carrier have agreed that the compensation for the

transportation and service connected therewith is fair and reasonable. Further, each order or determination issued shall set forth in a conspicuous place on the face thereof, in bold face type, a clear statement that the order or determination is concurrently filed with the Interstate Commerce Commission at Washington, D.C., that it is being simultaneously deposited with the Director, Office of the Federal Register, and that any protest seeking termination thereof under subsection (f) of section 5203 (39 U.S.C. 5203) must be filed in 15 days of the date of publication in the Federal Register. This statement may also include reference to the penalty provisions of section 5206 (39 U.S.C. 5206), and such other information as the Postal Service deems appropriate.

(3) *Copies; service.*—The original and six copies of each order or determination issued under this section shall be filed with the Commission, and one copy of the order or determination simultaneously shall be served upon the motor carrier specified therein and upon any other person known to be interested, in such a manner so as to be received on the date the original is filed with the Commission, and a copy also should be simultaneously deposited with the Director, Office of the Federal Register, for publication therein as notice to all other interested persons. A certificate shall be executed by an authorized official of the Postal Service, showing upon whom simultaneous service has been made. The order or determination filed with the Commission and the envelope of transmittal to the Commission should be clearly marked: "Mail Transportation Service Order (or Determination)."

(d) *Protests seeking termination of Postal Service orders or determinations, and replies thereto.*—(1) *General.*—A motor carrier subject to an order or determination of the Postal Service, or any of the carrier's other customers, may protest to the Commission and request termination of the order or determination. Such protest shall be restricted to the matter of showing that performance by the carrier of the required mail transportation service would be detrimental to the carrier or to its other customers, or that the carrier does not operate equipment suitable for the transportation of mail, and shall conform to the provisions of subparagraphs (2), (3), and (4) of this paragraph.

(2) *Content.*—The protest for termination of an order or determination filed under this section must identify the issued order or determination (i) by reference to the name and address of the motor carrier shown in the order or determination, (ii) the order number or other identification assigned thereto by the Postal Service, and (iii) specific citation to the volume, page, and date of publication in the Federal Register, *i.e.*, "———F.R.————197———." Facts relied upon in support of the protest must be verified as provided in rule 50 of the Commission's general rules of practice.

(3) *When filed.*—Protests requesting termination of an order or determination filed under this section will not be considered unless made in writing and filed with the Commission at Washington, D.C., within 15 days of the date of publication of the order or determination in the Federal Register.

(4) *Replies.*—Replies confined to rebuttal of such protest may be filed within 10 days of the date on which the protest was filed with the Commission.

(5) *Copies; service.*—The original and six copies of each protest or reply shall be filed with the Commission, and one copy simultaneously shall be served on the opposing party(ies). A certificate shall be executed stating that simultaneous service has been made. The protest or reply and the envelope of transmittal to the Commission should be clearly marked: "Protest (Reply)—Mail Transportation Service Order (or Determination)," and be delivered free of all charges. (Copies for service on

the Postal Service shall be addressed to the Assistant General Counsel Transportation, U.S. Postal Service, Washington, D.C. 20260, as agent for the Postmaster General).

(e) *Petitions for reconsideration.*—Petitions for reconsideration (1) of an order terminating an order or determination of the Postal Service, or (2) of a notice declining to order termination of such an order or determination, may be filed by any interested person within 20 days after service of the order or notice of the Commission. As no replies to the petitions for reconsideration under this rule are contemplated in view of the statutory time limitation, petitioners will be expected, except in unusual circumstances, to rely wholly on the information previously filed with the Commission. Such petitions for reconsideration must be clearly marked: "Petition for Reconsideration—Mail Transportation Service Order (or Determination)." Petitioners shall file an original and six (6) copies of the petition with the Commission and one copy thereof shall be served simultaneously on the opposing party(ies), and a certificate of service shall be executed to that effect.

(f) *Withdrawal of Postal Service order or determinations.*—If, within 90 days after the filing of an order or determination by the Postal Service, the motor carrier cited in the order or determination voluntarily agrees and undertakes to perform the required mail transportation service, the Postal Service shall promptly notify the Commission of such action and shall withdraw the Postal Service order forthwith.

§1100.250 ***Special rules for proceedings in which the elimination of discrimination against the shipment of recyclable materials is sought.***

(a) ***Filing of complaint.***—A person seeking elimination of discrimination against shipments of recyclable materials shall file a formal complaint. Such complaint should be so drawn as to fully advise the parties defendant and the Commission of the descrimination against recyclables complained of; make specific reference to the tariffs or schedules containing the rates, fares, or charges occasioning the discrimination against the shipment of recyclable materials, if the claimed discrimination is said to be occasioned by the rate structure; and in all other respects comport with the requirements for the commencement of proceedings as set forth in the rules of practice.

(b) ***Discrimination defined.***—For the purpose of these rules, "discrimination" is understood to encompass, but not be limited to, situations in which carriers charge different rates and/or charges for substantially similar transportation service on recyclable materials which are competitive, in whole or in part, with virgin natural resource materials. Any complainant of the view that the "discrimination" referred to in section 603 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 793 (1974), is other than "unjust discrimination" prescribed by section 2 of the Interstate Commerce Act shall set forth the reasons therefor in said complaint.

(c) ***Recyclable materials defined.***—For the purpose of these rules, the term "recyclable materials" includes, but is not limited to, commodities shown in Standard Transportation Commodity Code Tariff No. 1-B, Traffic Executive Association—Eastern Railroads, Agent, I.C.C. No. C-998, issued jointly with other agents, effective April 1, 1974, including the following:

STCC No.:	*Commodity*
22	Textile waste garneted or processed.
22 973 15	Noils, ramie.
22 973 25	Noils (Combings or comb).—

STCC No.:	*Commodity*
22 973 68	Rovings, jute and istle (ixtle).
32 299 24	Cullet (broken glass).
33 119	Blast furnace or coke oven products, nec.
32 312	Copper matte, speiss or flue dust.
33 322	Lead matte, speiss or flue dust.
33 332	Zinc dross, residues, ashes.
33 342	Aluminum residues.
33 398	Miscellaneous nonferrous metal residue.
40 1	Ashes.
40 2	Waste or scrap.

(d) *Filing of answer.*—Answers to claims of discrimination shall be so drawn as to fully advise the complainant, any other parties, and the Commission of the defense to the charge of discrimination against the shipment of recyclable materials that the respondent proposes to assert in its defense and otherwise conform to the requirements of the rules of practice.

(e) *Procedural handling.*—The proceeding following the commencement of the action as set forth in the foregoing rules shall be handled under modified procedure and will be accorded expeditious handling.

(f) *Intervention.*—(1) A summary of any complaint filed with the Commission under these rules will be published in the Federal Register as notice to interested parties. (2) Government agencies, environmental and other public interest groups, and trade associations having an interest in the proceeding may intervene as of right by filing a statement of their intention to participate within 20 days from the date that notice of the filing of a complaint is published in the Federal Register. After the expiration of that 20-day period, petitions for leave to intervene must be filed under rule 70 of the rules of practice, 49 CFR §1100.70.

(g) *Other procedures.*—In all other particulars, the proceeding shall be governed by the Commission's Rules of Practice.

APPENDIX A

Code of ethics for practitioners before the Interstate Commerce Commission

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PREAMBLE

No rules of conduct can be framed which will particularize all the duties of the practitioner in the varying phases of litigation or in his relations to clients, adversaries, other practitioners, the Commission and the public. The following canons of ethics are adopted as a general guide for those admitted to practice before the Interstate Commerce Commission.

It will be remembered that the practitioners before the Commission include (a) lawyers, who have been regularly admitted to practice law and (b) others having traffic or other technical experience qualifying them to aid the Commission in administration of the Interstate Commerce Act and related acts of Congress. The former are bound by a broad code of ethics and unwritten rules of professional conduct which apply to every activity of a lawyer; for the latter, no code of ethics has been written heretofore. The following canons do not release the lawyer from any of the duties or principles of professional conduct by which lawyers are bound. They apply alike to all practitioners before the Commission and the setting forth therein of particular duties or principles of conduct should not be construed as a denial of the existence of others equally imperative although not specifically mentioned. The word "Commission" as used herein includes divisions of the Commission, and the representatives of the Commission, whether members, examiners, or other employees connected with the matter in hand.

CANONS OF ETHICS

1. Standards of ethical conduct in courts of the United States to be observed. These canons are in furtherance of the purpose of the Commission's rules of practice which enjoin upon all persons appearing in proceedings before it to conform, as nearly as may be, to the standards of ethical conduct required of practitioners before the courts of the United States; and such standards are taken as the basis for these specifications, modified insofar as the nature of the practice before the Commission requires.

2. The duty of the practitioner to and his attitude toward the Commission. It is the duty of the practitioner to maintain toward the Commission a respectful attitude, not for the sake of the temporary incumbent of the office, but for the maintenance of the importance of the functions he administers. In many respects the Commission functions as a court, and practitioners should regard themselves as officers of that court and strive to uphold its honor and dignity. The Commission, not being wholly free to defend itself, is peculiarly entitled to receive the support of the practitioner against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a member or employee of the Commission it is the right and duty of the practitioner to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

3. Punctuality and expedition. It is the duty of the practitioner not only to his client, but to the Commission and to the public, to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

4. Attempts to exert political influence on the Commission. It is unethical for a practitioner to attempt to sway the judgment of the Commission by propaganda, or by enlisting the influence or intercession of members of the Congress or other public officers, or by threats of political or personal reprisal.

5. Attempts to exert personal influence on the Commission. Marked attention and unusual hospitality on the part of a practitioner to a Commissioner, examiner, or other representative of the Commission, uncalled for and unwarranted by the personal relations of the parties, subject both to misconstruction of motive and should be avoided. A self-respecting independence in the discharge of duty, without denial or diminution of the courtesy and respect due the official station is the only proper foundation for cordial personal and official relations between Commission and practitioners.

6. The selection of Commissioners. The nomination of commissioners is a duty of the President, and confirmation, of the Senate. It is the duty of the practitioners insofar as they attempt to advise the appointing or confirming officers, to endeavor to prevent any consideration from outweighing fitness in the selection.

7. The practitioner's duty in its last analysis. No client, corporate or individual, however powerful, no cause, civil or political however important, is entitled to receive, and no practitioner should render, any service or advice involving disloyalty to the law or disrespect of its official ministers, or corruption of any person or persons exercising a public office or employment or private trust, or deception or betrayal of

the public. In rendering any such improper service or advice the practitioner invites and merits stern and just condemnation. Correspondingly, he advances the honor of his calling and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, although until a statute shall have been construed and interpreted by competent adjudication, he is free and entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all he will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

8. Private communications with the Commission. In the disposition of contested proceedings brought under the Interstate Commerce Act the Commission exercises quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity. It is required to administer the act and to consider at all times the public interest beyond the mere interest of the particular litigants before it. To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a Commissioner, examiner, or other representative of the Commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them. Practitioners at all times should scrupulously refrain in their communications to and discussions with the Commission and its staff from going beyond ex parte representations that are clearly proper in view of the administrative work of the Commission.

9. Adverse influences and conflicting interests. It is the duty of a practitioner at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of the person to represent or assist him.

It is unethical to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon a practitioner represents conflicting interests when in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

10. Joint association of practitioners and conflicts of opinion. A client's proffer of the assistance of additional practitioner should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A practitioner should decline association as colleague if it is objectionable to the practitioner first retained, but if the client should relieve the practitioner first retained, another may come into the case.

When practitioners jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted by them unless the nature of the difference makes it impracticable for the practitioner whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another practitioner are unworthy of those who should be brethern, but nevertheless, it is the right of any practitioner, without fear or favor, to give proper advice to those seeking relief against an unfaithful or neglectful practitioner, generally after communication with the practitioner of whom the complaint is made.

11. Withdrawal from employment. The right of a practitioner to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The practitioner representing him should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the practitioner's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the practitioner may be warranted in withdrawing on due notice to the client, allowing him time to employ another. So also when a practitioner discovers that his client has no case and the client is determined to continue it; or even if he finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, he should refund such part of the retainer as has not been clearly earned.

12. Advising upon the merits of a client's cause. A practitioner should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. He should beware of bold and confident assurances to clients, especially where employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

13. Negotiations with opposing party. A practitioner should not in any way communicate upon the subject of controversy with a party represented by another practitioner except upon express agreement with the practitioner representing such party; much less should he undertake to negotiate or compromise the matter with him, but should deal only with the practitioner who represents the other party. It is incumbent upon the practitioner most particularly to avoid everything that may tend to mislead a party not represented by a practitioner, and he should not undertake to advise him as to the law.

14. Fixing the amount of the fee. In fixing fees, practitioners should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, although his poverty may require a less charge, or even none at all.

15. Compensation, commission, and rebates. A practitioner should accept no compensation, commissions, rebates, or other advantages from the parties to the proceeding other than his client without the knowledge and consent of his client after full disclosure.

16. Contingent fees. Contingent fees should be such only as are sanctioned by law. In no case, except a charity case, should they be entirely contingent upon success.

17. Division of fees. No division of fees for services is proper, except with a member of the bar or with another practitioner, based upon a division of service or responsibility. It is unethical for a practitioner to retain laymen to solicit his employment in pending or prospective cases, and reward them by a division of fees, and such a practice cannot be too severely condemned.

18. Suing clients for fees. Controversies with clients concerning compensation are to be avoided insofar as compatible with self-respect and with the right to receive reasonable recompense for services; and lawsuits against clients should be resorted to only to prevent injustice, imposition or fraud.

19. Acquiring interest in litigation. The practitioner shall not purchase or otherwise acquire any pecuniary interest in the subject matter of the litigation which he is conducting.

20. Expenses. A practitioner may not properly agree with a client that the practitioner shall pay or bear the expenses of litigation. He may in good faith advance expenses as a matter of convenience but subject to reimbursement by the client.

21. Witnesses. A practitioner shall not undertake that the compensation of a witness shall be contingent upon the success of the cause in which he is called. If the ascertainment of truth requires that a practitioner should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client.

22. Dealing with trust property. Money of the client or other trust property coming into the possession of the practitioner should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with the practitioner's private property or be used by him.

23. How far a practitioner may go in supporting a client's cause. Nothing will operate more certainly to create or foster popular prejudice against practitioners as a class, and deprive them of that full measure of public esteem and confidence which belongs to the proper discharge of their duties than does the false claim, often set up by the unscrupulous in defense of questionable transaction, that it is the duty of the practitioner to do whatever may enable him to succeed in winning his client's cause.

The practitioner owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by rules of law, legally applied. No fear of the disfavor of the Commission or public unpopularity should refrain him from full discharge of his duty. The client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his counsel to assert every such remedy or defense. But it is to be steadfastly borne in mind that this great trust is to be performed within and not without the bounds of the law. Admission to the privilege of appearing before the Commission as representing another does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

24. Restraining clients from improprieties. A practitioner should use his best efforts to restrain and to prevent his clients from doing those things which he himself ought not to do, particularly with reference to their conduct towards the Commission, other practitioners, witnesses and suitors. If a client persists in such wrong-doing, the practitioner should terminate their relations.

25. Ill-feeling and personalities between advocates. Clients, not their representatives, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence practitioners in their conduct and demeanor toward each other or toward suitors in the case. All personalities between practitioners should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of practitioners on the other side. Personal colloquies between practitioners which cause delay and promote unseemly wrangling should also be carefully avoided. Their statements should be addressed to the Commission.

26. Treatment of witnesses and litigants. A practitioner should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudice of a client in the trial or conduct of a cause. The client cannot be made the keeper of the practitioner's conscience in such matters. He has no right to demand that the practitioner representing him shall abuse the

opposing party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking on his own behalf.

27. (none)

28. Discussion of pending litigation in public press. Attempt to influence the action and attitude of the members and examiners of the Commission through propaganda or through colored or distorted articles, in the public press, are more apt to react against than in favor of the parties resorting to such measures. On the other hand, it is not against the public interest or unfair to the Commission that the facts of pending litigation shall be made known to the public through the press in a fair and unbiased manner and in dispassionate terms. Practitioners should themselves avoid, and should counsel their clients against, giving to the public press any press notices or statements of a nature intended to inflame the public mind, to stir up possible hostility toward the Commission, or to influence the Commission's course and judgment as to pending or anticipated litigation. When the circumstances of a particular case appear to justify a statement to the public through the press, it is unethical to make it anonymously.

29. Candor and fairness. The conduct of practitioners before the Commission and with other practitioners should be characterized by candor and fairness. The nontechnical character and liberality of the Commission's practice call for scrupulous observance of the principles of fair dealing and just consideration for the rights of others.

It is not candid or fair for a practitioner knowingly to misstate or misquote the contents of a paper, the testimony of a witness, the language or the argument of an opposing practitioner, or the language or effect of a decision or a text book; or, with knowledge of its invalidity to cite as authority a decision which has been overruled or otherwise impaired as a precedent or a statute which has been repealed; or in an argument to assert as a fact that which has not been proved, or to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A practitioner should not offer evidence, which he knows the Commission should reject, in order to get the same before the Commission by argument for its admissibility, or arguments upon any point not properly calling for determination. He should not introduce into an argument remarks or statements intended to influence the bystanders.

These and all kindred practices are unethical and unworthy of a practitioner.

30. Right of practitioner to control the incidents of the trial. As to incidental matters pending the trial, not affecting the merits of the cause or working substantial prejudice to the rights of the client, such as forcing the opposing practitioner to trial when he is under affliction or bereavement, forcing the trial on a particular day to the injury of the opposing practitioner when no harm will result from trial at a different time, agreeing to extensions of time and the like, the practitioner and not the client, must be allowed to judge. In such matters no client has a right to demand that his practitioner shall be illiberal or do anything therein repugnant to the practitioner's sense of honor and propriety.

31. Taking technical advantage of opposing practitioner; agreements with him. A practitioner should not ignore known customs or practice of the Commission, even when the law permits, without giving timely notice to the opposing practitioner. Insofar as possible, important agreements affecting the rights of the clients should be

reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing.

32. Advertising, direct or indirect. The most worthy and effective advertisement possible is the establishment of a well-merited reputation for capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not improper. But solicitation of employment by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unethical. It is equally unethical to procure business by indirection through touters of any kind. Indirect advertisement for employment by furnishing or inspiring newspaper comments concerning causes in which the practitioner has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the practitioner's positions, and all other like self-laudation, lower the tone of the calling and are intolerable.

33. Professional card. The simple professional card mentioned in canon 32 may with propriety contain only a statement of the practitioner's name (and those of his associates), occupation, address, telephone number, and special branch or branches of practice. Such cards may be inserted in reputable lists and may give authorized references, or name clients with their permission.

34. Stirring up litigation, directly or through agents. It is unethical for a practitioner to volunteer advice that a proceeding be brought before the Commission, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unethical but is is indictable at common law. It is disreputable for a practitioner to hunt up defects or other causes of action and disclose them in order to be employed to bring complaint, or to breed litigation by seeking out those having claims for damages or any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly, or indirectly, those who bring or influence the bringing of such cases to his office to seek his services. No complaint should be brought before the Commission by a practitioner except with the distinct knowledge and specific consent of the client in the particular case. A duty to the public and to the Association devolves upon every member having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disciplined or disbarred.

35. Justifiable and unjustifiable litigation. The practitioner must decline to conduct a cause or to make a defense when convinced that it is intended merely to harass or to injure the opposing party, or to work oppression or wrong. But otherwise, it is his right, and having accepted retainer, it becomes his duty, to insist upon the judgment of the Commission as to the merits of his client's claim. His appearance should be deemed equivalent to an assertion upon his honor that in his opinion his client's case is one proper for determination.

36. Responsibility for litigation. No practitioner is obliged to act either as adviser or advocate for every person who may seek to become his client. He has the right to decline employment. Every practitioner upon his own responsibility must decide what employment he will accept, what causes he will bring before the Commission for complainants, or contest for defendants or respondents. The responsibility for advising as to questionable transactions, for bringing questionable proceedings, for urging questionable defenses is his alone. He cannot escape it by urging as excuses

that he is only following his client's instructions, or that he is under a stated retainer or in the regular employment of his client.

37. Discovery of imposition and deception. When a practitioner discovers that some fraud or deception has been practiced, which has unjustly imposed upon the Commission or a party, he should endeavor to rectify it; first by advising his client to forego any advantage thus unjustly gained and, if his client refuses, by promptly informing the injured person or his counsel (practitioner) so that appropriate steps may be taken.

38. Upholding the honor of the calling. Practitioners should expose without fear or favor before the proper tribunals corrupt or dishonest conduct and should accept without hesitation employment against a practitioner who has wronged his client. The practitioner upon the trial of a cause in which perjury has been committed owed it to the Commission and to the public to bring the matter to the knowledge of the prosecuring authorities. The practitioner should aid in guarding the bar of the Commission against admission thereto of candidates unfit or unqualified because deficient in either moral character or education. A practitioner should propose no person for admission to practice before the Commission unless from personal knowledge or upon reasonable inquiry he sincerely believes and is able to vouch that such person possesses the qualifications prescribed in the Commission's rules of practice. He should strive at all times to uphold the honor and maintain the dignity of his calling and to improve not only the law but the administration of justice.

39. Intermediaries. The services of a practitioner should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and practitioner. His responsibility and qualifications are individual. He should avoid all relations which direct the performance of his duties in the interest of such intermediaries. His relation to the client should be personal, and the responsibility should be direct to the client.

He may accept employment from any organization such as an association, club or trade organization, authorized by law to be a party to proceedings before the Commission, to render services in such proceedings in any matter in which the organization, as an entity, is interested. This employment should only include the rendering of such services to the members of the organization in respect to the individual affairs as are consistent with the free and untrammeled performance of his duties to the Commission.

Nothing in this canon shall be construed as conflicting with canon 17.

40. Retirement from public employment. A practitioner, having once held public office or having been in the public employ, should not after his retirement, accept employment as an advocate or adviser in the same proceeding or as to the same, or substantially the same, facts as were involved in any specific question which he investigated or passed upon in a judicial or quasi-judicial capacity while in such office or employ, whether the same or different parties are concerned.

41. Confidences of a client. The duty to preserve his client's confidences in the course of his employments outlasts the practitioner's employment, and extends as well to his employees. None of them should accept employment which involves the disclosure or use of these confidences, either for the private advantage of the practitioner or his employees or to the disadvantage of the client, without knowledge and consent of the client even though there are other available sources of such information. A practitioner should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a practitioner is falsely accused by his client, he is not precluded for disclosing the truth in respect to the false accusation. The announced intention of a client to commit a crime is not included within the confidences which a practitioner is bound to respect He may properly make such disclosures as to prevent the act or protect those against whom it is threatened.

42. Partnerships-names. Partnerships among practitioners for the practice of their calling are very common and are not to be condemned. The rules of the Commission provide that corporations of firms will not be recognized. Practitioners before the Commission should therefore appear individually and not as members of partnerships. In the formation of partnerships care should be taken not to violate any law locally applicable; care should also be taken to avoid any misleading name or representation which would create a false impression as to the position or privileges of a member not locally admitted, or who is not duly authorized to practice, and as such amenable to discipline. No person should be held out as a practitioner or member who is not so admitted. No practitioner who is not admitted to practices in the courts should be held out in a way which will give the impression that he is so admitted. No false or assumed or trade name should be used to disguise the practitioner or his partnership. The continued use of the name of a deceased or former partner is or may be permissible by local custom, but care should be taken that no imposition or deception is practiced through this use. If a member of the firm becomes a Commissioner, or an examiner or other employee of the Commission his name should not be retained in the firm name, as such retention may give color to the impression that an improper relation or influence is continued or possessed by the firm.

This canon does not inhibit the association of a practitioner with a mercantile, manufacturing, or other commercial institution, in the capacity of its representative or adviser.

43. Titles. No member of the Association not admitted to the bar shall use the title "Attorney" or "Counsel" but should use the title "Traffic Manager," "Practitioner before the Interstate Commerce Commission," "Registered Practitioner," or other appropriate title or designation.

APPENDIX B

Approved forms

TABLE OF CONTENTS

1. Complaint; verification.
2. Answer.
3. Certificate of service.
4. Petition for leave to intervene.
5. Form of reparation statement under Rule 95.
6. Verification for statements of fact filed under modified procedure.
7. Approved Form No. 7 under Rule 245.

[These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary. Before using such forms the pertinent rules, particularly those referred to in the footnotes, should carefully be studied.]

NO. 1 COMPLAINT[1]

Before the Interstate Commerce Commission

COMPLAINT

____

v.

____

[Insert without abbreviation the names of the complainant and defendant (Including each of the receivers, operating trustees, or other legal representatives of defendant), and whether a corporation, firm or partnership, specifying the individual name of the parties composing the partnership; and the post office address of any motor carrier defendant.]

The complaint of the above-named complainant respectfully shows:

I. [Complainant should here state nature and place of business, also whether a corporation, firm, or partnership and if a firm or partnership, the individual names of the parties composing same.]

II. That the defendant above-named is [here state whether: (a) carrier by railroad, express, motor vehicle (common or contract), water (common or contract), a freight forwarder, or otherwise; (b) the transportation is of property or passengers, or both; and (c) the transportation involves a freight forwarder or more than one type of carrier (specifying particulars) between points in the State of and points in the State of [a complaint under part II should specifically name the States in and through which the transportation which gives rise to the complaint is performed] and as such defendant is subject to the provisions of the Interstate Commerce Act.

III. That [state in this and subsequent paragraph to be numbered IV, V, et cetera, the matter or matters intended to be complained of, naming every rate, fare, charge, classification, regulation, or practice the lawfulness of which is challenged, and also, if practicable the points between which the rates, et cetera, complained of are applied. Where it is impracticable to designate each points, describe clearly the rate territory or rate group involved. Whenever practicable tariff or schedule reference should be given.]

[Where unlawful discrimination, preference, or prejudice is alleged the particular elements specified in the act as constituting such violation (see sections 2, 3, 4, 13, 216, 217, 218, 305, and 406) and the facts upon which complainant relies to establish the violation should be stated clearly. Where any provision of the act other than those just mentioned, or any requirement established pursuant to the act, is alleged to be violated, the pertinent statutory provision, or established requirement, together with the facts which are alleged to constitute the violation, should be stated. If two or more subsections of the act or requirements established pursuant thereto are alleged to be violated, the facts claimed to constitute violation of one subsection, or requirement, should be stated separately from those claimed to constitute a violation of another subsection, or requirement, wherever that can be done by reference or otherwise without undue repetition.]

---

[1] See rules 24 to 31, inclusive.

X. That by reason of the facts stated in the foregoing paragraphs complainant has been subjected to the payment of rates [fares or charges, et cetera] for transportation which were when exacted and still are (1) unjust and unreasonable in violation of section , of the Interstate Commerce Act, and (2) unjustly discriminatory in violation of section , and (3) unduly preferential or prejudicial in violation of section , and (4) in violation of the long-and-short haul [or aggregate of intermediate rates] provision of section 4 thereof. [Use one or more of the allegations numbered (1), (2), (3), (4), or other appropriate allegation according to the nature of the complaint.] That [if recovery of damages is sought] complainant has been injured thereby to his damage in the sum of $

Wherefore complainant prays that defendant be required to answer to charges herein; that after due hearing and investigation an order be made commanding said defendant [and each of them] to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of between the origin and destination points named in paragraph hereof, in lieu of the rates [fares or charges, et cetera], named in said paragraph, such other rates [fares, or charges, et cetera], as the Commission may deem reasonable and just [and also, if recovery of damages is sought, pay to complainant by way of reparation for the unlawful charges hereinbefore alleged the sum of $, or such other sum, as in view of the evidence to be adduced herein, the Commission shall determine that complainant is entitled to an award of damages under the provisions of said act for violation thereof], and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at ______________________________, 19____.

____
(Complainant's signature[4])

____
(Office and post-office address)

____
(Signature of practitioner)

____
(Post-office address)

---

[4] See footnote to verification.

VERIFICATION[3]

STATE OF ____________________]
County of ____________________] ss

____, being duly sworn, deposes and says: that he is the complainant (or, one of the complainants; or, is the (insert title of the affiant if complainant is a corporation) of the company, complainant) in the above-entitled proceeding; that he has read the foregoing complaint, and knows the contents thereof; that the same are true as stated, except as to matters and things if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

____

Subscribed in my presence, and sworn to before me, by the affiant above named, this day of 19

[USE AN L.S. IMPRESSION SEAL]

____

[Title of Officer]

Commission expires

NO. 2. ANSWERS[4]

Before the Interstate Commerce Commission

ANSWER

Docket No. ____________________

____

v.

____

The above-named defendant, for answer to the complaint in this proceeding, respectively states:

I. [Here set forth appropriate and responsive admissions, denials, and averments, specifically answering the complaint paragraph by paragraph.]

---

[3] Signature and verification by complainant unnecessary if complaint is signed by a practitioner. See rule 15.

[4] See rules 33 to 35, inclusive.

Wherefore defendant prays that ____________________

Dated ____________________, 19

____

(Name of defendant)

By[5] ____________________

____

(Title of Officer)

____

(Office and post-office address)

____

(Signature of Practitioner)

____

(Post-office Address)

NO. 3 CERTIFICATE OF SERVICE[6]

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by (here state the precise manner of making service, which must be consistent with the provisions of Rule 22).

Dated at ____________________, this ____________________ day

of ____________________, 19 __________

(Signature) ____________________

NO. 4 PETITION FOR LEAVE TO INTERVENE

Before the Interstate Commerce Commission

PETITION

____

[v.] Docket No. ____________________

____

(or state other title)

Comes now your petitioner, ____________________

____________________, and respectfully represents that he has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

---

[5] See rule 15.

[6] See rule 20.

I. That [Petitioner should here state nature and place of business, and whether as corporation, firm, or partnership, etc., as in form No. 1].

II. [Petitioner should here set out specifically his position and interest in the proceeding.]

III. [If affirmative relief is sought see paragraphs III and X and prayer in form No. 1.]

Wherefore said ——————————————————
prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross examine witnesses, and be heard in person or by counsel upon brief and at the oral arguments, if oral argument is granted.

[If affirmative relief is sought insert appropriate prayer here.]

Dated at ——————————————————, 19

[See forms Nos. 1 and 3 as to subscription, verification, and certificate of service.]

NO. 5. FORM OF REPARATION STATEMENT UNDER RULE 95

Claim of———— under decision of the Interstate Commerce Commission in Docket No. ——————————————————

Date of shipment	Date of delivery or tender of delivery	Date charges were paid	Car[1] initials	Car[2] number	Origin	Destination	Route	Commodity	Weight	Rate	Amount	Rate	Amount	Reparation on basis of the Commission's decision	Charges paid by

Claimant hereby certifies that this statement includes claims only on shipments covered by the findings in the docket above described and contains no claim for reparation previously filed with the Commission by or on behalf of claimant or, so far as claimant knows, by or on behalf of any other person, in any other proceedings, except as follows: (Here indicate any exceptions, and explanation thereof).

———————————
Claimant

By ———————————
Practitioner

———————————
Address

———————————
Date

Total amount of reparation $ ———————————

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct.

Date ——————Concurred[5] in: ——————

Company———————————Company, Defendant Collecting Carrier, Defendant.[4]

By ———————————,Auditor. By ——————————— Auditor.

---

[1]Substitute "Vessel" if water carrier involved.

[2]Substitute "Voyage No." if water carrier involved.

[3]Here insert name of person paying charges in the first instance, and state whether as consignor, consignee, or in what other capacity.

[4]If not a defendant, strike out word "defendant."

[5]For concurring certificate in case collecting carrier is not a defendant.

NO. 6. VERIFICATION FOR STATEMENTS OF FACT FILED UNDER MODIFIED PROCEDURE[*]

STATE OF ———————————,

ss:

County of———————————,

——————————being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted therein, and that the same are true as stated.

(Signed) ———————————

---

[*]See rule 48.

Subscribed and sworn to before me this ________ day of ________

Notary Public of ________
My Commission expires ________

NO. 7 NOTICE OF FILING OF APPLICATION FOR PUBLICATION IN FEDERAL REGISTER UNDER SECTION 205(a)(6) OF THE INTERSTATE COMMERCE ACT, AS AMENDED

(See instructions)

PART I

(To be completed by applicant)

Notice is hereby given that the below named applicant has filed with

____

(Name of State Commission)

an application for a certificate to conduct motor common carrier operations in intrastate commerce; that, in connection with such operations, applicant also is seeking authority to engage in transportation in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations which may be authorized to be conducted; and that the intrastate and interstate operations proposed to be conducted are as set forth below.

1. ________
(Name and business address of applicant)

____
(Street) (City) (State)

2. ________
(Name and address of applicant's representative, if any)

____
(Street) (City) (State)

3. Describe below in full the operations proposed to be conducted in intrastate commerce, together with the extent to which applicant is seeking authority in connection with such intrastate operations to engage in transportation in interstate and foreign commerce. (If additional space is necessary, use reverse side.)

____
(Signature)

____
(Title)

Date ________ 19

PART II

(To be completed by State Commission)

Date of filing application ____________________

Docket number assigned ____________________

Date and time and place application has been assigned for hearing, if known—

____

____

(Signature)

____

(Title)

____

(Name of State Commission)

Date this notice forwarded to Interstate Commerce Commission, Washington, D.C. 20423, ____________________19

INSTRUCTIONS

This form is for use in giving notice to interested persons regarding the filing of intrastate motor carrier applications in connection with which the applicant also desires authority to engage in interstate and foreign commerce pursuant to section 206(a)(6) of the Interstate Commerce Act, as amended October 15, 1962, by Public Law 87-805. It should be filed in duplicate (along with the intrastate application) with the State Commission, which will forward it to the Interstate Commerce Commission, Washington, D.C. 20423.

The description in part I, item 3 should include the commodities (or passengers) sought to be transported, the points to be served, and the routes over which, or territories within which, such transportation is to be performed. Care should be taken to insure that the description, which will be published in the Federal Register, fully informs interested persons of the type and scope of the proposed intrastate operations, and the extent to which applicant desires authority to engage in transportation in interstate and foreign commerce in connection with such intrastate operations.

APPENDIX C—EX PARTE COMMUNICATIONS

1. *Ex parte communications.*—(a) No person who is a party to, or counsel or agent of a party, or who intercedes in, any on-the-record proceeding, shall submit any ex parte communication concerning the merits of the proceeding to any member of the Commission, hearing officer, member of a joint board, or to any employee of the Commission participating or who may reasonably be expected to participate in the decision in such proceeding.

(b) No member of the Commission, hearing officer, member of a joint board, or employee of the Commission participating or who may reasonably be expected to participate in the decision in such proceeding shall invite or knowingly entertain any prohibited ex parte communication, or make any such communication to any party to, or counsel or agent of a party, or any other person who he has reason to know may transmit such communication to a party or party's agent.

2. The prohibitions of paragraph 1 apply from the time an on-the-record proceeding is noticed for oral hearing or the taking of evidence by modified procedure, at such time as the person responsible for the communication has knowledge that the proceeding will be so noticed, or from such earlier time as the Commission may fix by rule or order in the particular case.

3. For the purposes hereof:

(a) "On-the-record proceeding" means a proceeding described in section 556-557 of the Administrative Procedure Act (5 U.S.C. 556-557) or a proceeding required by the Constitution, by statute, by Commission rule, or by order in the particular case, to be decided solely upon the record made in a Commission hearing.

(b) "Person who intercedes in any proceeding" means any individual outside the Commission (whether public or private life), partnership, corporation, or association, other than a party or an agent of a party, who volunteers a communication which he may be expected to know may advance or adversely affect the interest of a particular party or any party's agent.

(c) "Ex parte communication concerning the merits" includes both oral and written communications, but the following classes of ex parte communication shall not be prohibited:

(1) Any oral or written communication which all the parties to the proceeding agree, or which the Commission, the hearing officer, or joint board formally rules, may be made on an ex parte basis.

(2) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive issue in a pending on-the-record proceeding in which he is interested.

(3) Any communication by means of any new medium which in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publications with respect to pending on-the-record proceedings.

(d) "Any employee of the Commission participating in the decision" includes personal assistants to members of an employee review board appointed pursuant to Public Law 87-247 (1961) to whom the proceeding may be referred for decision, employees of the Commission's Office of Proceedings, employees of the Rail Services Planning Office, and the staff of the General Counsel's Office.

4. Any member of the Commission, hearing officer, member of a joint board, or employee of the Commission, participating or who reasonably may be expected to participate in the decision, who personnally receives a written communication which he believes is prohibited at the time received, shall promptly transmit the written communication, or a written summary of the substance of an oral communication, together with a written statement of the circumstances under which the communication was made, if not apparent from the communication itself, to the Secretary of the Commission, who shall place any material so received in the correspondence section of the public docket of the proceeding. Any such person who receives a communication and who is not certain whether such communication is a prohibited ex parte communication may request, and shall be given promptly, a ruling on the question from the Commission's General Counsel. The Chairman of the Commission shall be notified promptly of all reports of ex parte communications, or

requests for rulings on possible ex parte communications, transmitted to the Secretary or the General Counsel. He may require that any such communication be placed in the correspondence section of the docket if he concludes that the dictates of fairness require that it be made public, even if it is not prohibited communication, and he may direct the taking of such other or further action as may be appropriate under all the circumstances.

5. The Commission may censure, or suspend or revoke the privilege to practice before the agency, of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication.

6. To the extent permitted by law, the relief or benefit sought by a party to a proceeding may be denied if the party, or an agent of the party, knowingly and willfully violates the foregoing prohibitions or requirements.

7. The Commission may censure, suspend, or dismiss, or institute proceedings for the suspension or dismissal of, any Commission employee who knowingly and willfully violate the foregoing prohibitions or requirements.

APPENDIX D—ATTORNEYS-QUALIFICATION

I, ____

(Name)

____

(Address) (Telephone No.)

hereby declare that I am an attorney at law qualified as a member in good standing of the bar of the highest court of the ______________________

____

(Signature)

APPENDIX E—INDEX OF THE SPECIAL RULES CONTAINED PARTS 1101-1159.

PARTS 1101-1109—RULES OF PRACTICE

PART	
1101	Temporary operating authorities and approvals.
1102	Procedures governing rail carrier general increase proceedings.
1104	Procedures to be followed in motor carrier revenue proceedings.
1107	Requirements and procedures relating to Railroad Rate Adjustment Act of 1973.
1108	Revised Guidelines for Implementation of the National Environmental Policy Act of 1969.

PARTS 1110-1119—RAIL CARRIERS CONSOLIDATION, FINANCE, AND REORGANIZATION

1110	General requirements.
1111	Railroad and water carrier consolidation procedure.
1112	Interlocking officers.
1113	Guaranty of loans to carriers by railroad.

PART	
1114	Alteration or modification of securities and the provisions of instruments, and filing of certificates and reports.
1115	Issuance of securities, assumption of obligations, and filing of certificates and reports.
1116	Recordation of documents.
1117	Reorganization of railroads.
1118	Corporate reorganization of carriers and corporations.

PARTS 1120-1129—SPECIAL PROCEDURES; RAIL CARRIERS CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

1120	Construction, extension, acquisition, or operation of railroad lines.
1121	Abandonment of railroad lines.
1122	Discontinuance or change of operation or service.
1123	Determination of avoidable losses.
1124	Regulations governing the adequacy of intercity railroad passenger service.
1125	Standards for determining rail service continuation subsidies.
1126	Submission of cost data to justify reimbursement for directed service.

PARTS 1130-1139—SPECIAL PROCEDURES; MOTOR CARRIERS AND BROKERS CERTIFICATES, PERMITS, LICENSES

1130	Applications for motor carrier certificates and permits.
1131	Temporary authority applications under section 210a(a) of the Interstate Commerce Act.
1131a	Temporary authority applications under section 311(a) of the Interstate Commerce Act.
1132	Transfers of operating rights.
1133	Transfers of Passenger Brokers' Licenses.
1134	Control or consolidation of motor carriers or their properties.
1135	Corporate reorganizations of motor carriers.

PARTS 1140-1149—SPECIAL PROCEDURES; WATER CARRIERS

1140	Extensions of operations.
1141	Transfer of certificates and permits to operate.

PARTS 1150-1159—SPECIAL PROCEDURES; FREIGHT FORWARDERS

1150	Applications for permits.
1151	Transfers of operating rights (permits)

APPENDIX F

Number of copies of documents (in addition to original) to be filed with the Commission

Type of document	Citation	Number of copies Original plus:
Applications—finance matters		
Competitive Bidding Requirements—Exemption	49 CFR 1115.25 (49 CFR 1110.7)	Six (6)
Interlocking Officers—Approval	49 CFR 1112.7	Six (6)
Rail Line—Abandonment	49 CFR 1121.4(a)	Six (6)
Rail Line—Construction, Extension, Acquisition or Operation	49 CFR 1121.2(b)	Nine (9)
Rail or Ferry Line—Discontinuance or Change of Service	49 CFR 1121.8	
(If by Notice)		Eight (8) of Notice Seven (7) of Statements
(If by Petition)		Seven (7)
Railcarriers—Guaranty Loans	49 CFR 1113.4(c)	Six (6)
Railroad Consolidation	49 CFR 1111.4(b)	Five (5)
Railroad Reorganization	49 CFR 1117.12(b)	Six (6)
Securities Issuance, Assumption of Obligations	49 CFR 1115.3(e) (49 CFR 1110.7)	Six (6)
Securities or Instruments—Alteration or Modification	49 CFR 1114.3(b)	Six (6), plus one (1) for governor of each State in which applicant operates.
Applications—Motor carrier and broker		
Acquisition of Control. (Form OP-F-45)	49 CFR 1134.50(b) (49 CFR 1003.1)	Five (5)
Brokers of Passengers—License. (Form OP-OR-11)	(49 CFR 1003.1)	None
Brokers of Property—License (Form OP-OR-11)	(49 CFR 1003.1)	Do.
Certificate of Exemption. (Form OP-OR-110)	(49 CFR 1003.1)	Do.
Certificate of Registration (Form OP-OR-100)	49 CFR 1047.10 (49 CFR 1003.1)	Do.

APPENDIX F

Number of copies of documents (in addition to original) to be filed with the Commission

Type of document	Citation	Number of copies Original plus:
Applications—Motor carrier and broker—Continued		
Motor Carrier—Certificate or Permit. (Form OP-OR-9)	49 CFR 1130.1(b) (49 CFR 1003.1)	One (1)
Merger, Consolidation, Purchase, or Lease. (Form OP-F-44)	(49 CFR 1003.1)	Five (5)
Rental Contract Approval—Contract Carrier. (Form BOp79)	(49 CFR 1003.1)	Three (3) plus three (3) of rental contract.
Temporary Authority (Form OP-MCB-95)	49 CFR 1131.2(b) (49 CFR 1003.1)	Six (6)
Temporary Operation (Form OP-F-46)	49 CFR 1134.6(b) (49 CFR 1003.1)	Five (5)
Transfer or Lease of Certificate of Registration (Form OP-M-110).	49 CFR 1132.12(b) (49 CFR 1003.1)	Four (4)
Transfer or Lease of Operating Rights or Broker License (Form OP-M-100).	49 CFR 1132.2 (49 CFR 1003.1)	Four (4)
Applications—Water carrier and freight forwarder		
Certificate of Exemption—Water Carrier (Form OP-WC-10)	(49 CFR 1003.2)	One (1)
Exemption by Contract Carriers—by Water (Form BWC-1)	(49 CFR 1003.2)	One (1)
Extension of Operations (Form OP-WC-20)	49 CFR 1140.1(b) (49 CFR 1003.3)	One (1)
Freight Forwarder Permit (Form OP-FF-10)	49 CFR 1150.1 (49 CFR 1003.3)	One (1)
New Certificates and Permits (Form OP-WC-20)	49 CFR 1140.1(b) (49 CFR 1003.2)	One (1)
Transfer of Water Carrier Certificates and Permits	49 CFR 1141.6(b)	Four (4)
Transfer of Freight Forwarder Permit	49 CFR 1151.5(b)	Four (4)

APPENDIX F

Number of copies of documents (in addition to original) to be filed with the Commission

Type of document	Citation	Number of copies Original plus:
Applications—other		
Fourth Section	Rule 200	Six (6) Fourteen (14) if Div. 2 matter.
Released Rates	Rule 225(e)	Six (6)
Special Permission	Rule 225(e)	Six (6)
Section 5a. (Forms OP-F-44 and OP-F-45)	49 CFR 1134.1(b) & 1134.50(b) (49 CFR 1003.1)	Five (5)
Pleadings and other documents		
Admission, Requests for	Rule 6(a)	One (1) (copy only)
Answers to Requests for Admissions		One (1) (copy only)
Administrative Appeals, Petitions for Stay	Rules 97 & 98	Six (6)
General Transportation Importance—Petitions	Rules 97 & 98	Fourteen (14)
Employee Board Action—Petition for Reconsideration	Rule 225(e)	Six (6)
Suspension and fourth-section matters—Petition for Reconsideration.	Rule 200(5)	Six (6), Fourteen (14) if Div. 2 matter.
Investigation into discontinuance—Order instituting or decision not to investigate—Petition for Reconsideration.	Rule 245(g), Rule 245(h)(3)	Six (6)
Bankruptcy proceedings—Various pleadings	Rule 14	Six (6)
Complaints—Formal	Rule 24(a)	Six (6) copies plus one (1) for each defendant to be served. If State-made rates involved one (1) additional copy for each State concerned.

APPENDIX F

Number of copies of documents (in addition to original) to be filed with the Commission

Type of document	Citation	Number of copies Original plus:
Pleadings and other documents—Continued		
Complaints—Informal—Not Seeking damages	Rule 22(a)	One (1)
Complaints—Informal—Seeking damages	Rule 23(d)	One (1) for each defendant to be served.
Complaints—Answers	Rule 33(c)	Six (6) copies
Complaints—Satisfaction	Rule 35	None
Depositions	Rule 62	One (1) plus One (1) copy of exhibits.
Exhibits	Rule 82(c)	One (1) copy; plus one (1) copy for each counsel and each board member.
Interrogatories—Written	Rule 60(a)	One (1) (copy only)
Interrogatories—Answers to	Rule 60(a)	One (1) (copy only)
Intervention Petitions	Rule 70(d)	Three (3)
Intervention Petitions—At Oral Hearing	Rule 70	One (1) plus one (1) for each party represented. If granted, one (1) for Commission.
Modified Procedure—Verified Statements—In General	Rule 50	Six (6)
Modified Procedure—Verified Statements—Applications	Rule 247(e)(3)	One (1)
Prepared Statements—Oral hearing	Rule 75	Copy for reporter, and one (1) for each counsel.

APPENDIX F

Number of copies of documents (in addition to original) to be filed with the Commission

Type of document	Citation	Number of copies Original plus:
Pleadings and other documents—Continued		
Protests—General	Rule 38(c)	Six (6)
Protests—Motor Carrier Finance	Rule 240(c)(1)	One (1)
Protests—Investigation and Suspension Proceedings	Rule 40(d)	Six (6)
Protests—Motor Carrier, Broker, Water Carrier, Freight Forwarder Applications.	Rule 247(d)(1)	One (1)
Oral Argument Matters	Rule 93	None
Replies to Pleadings	Rule 21(c)	Same number as pleading replied to.
Subpoena Requests	Rule 54	None
Time Modification—Requests for Extension	Rule 19(b)	None
Transcript Correction	Rule 88(b)	Two (2) for reporter

APPENDIX G

Commission hearing and appellate procedure

SEC. 303. (a) Secction 17 of the Interstate Commerce Act (49 U.S.C. 17) is amended by redesignating paragraphs (9) through (12) thereof as paragraphs (10) through (13) thereof, respectively, and by inserting therein the following new paragraph (9):

"(9)(a) Whenever the term hearing is used in this part, such term shall be construed to include an opportunity for the submission of all evidence in written form, followed by an opportunity for briefs, written statements, or conferences of the parties, such conferences to be chaired by a division, an individual Commissioner, an administrative law judge, an employee board, or any other designated employee of the Commission.

"(b) With respect to any matter involving a common carrier by railroad subject to this part, whenever the Commission assigns the initial disposition to any such matter before the Commission to an administrative law judge, individual Commissioner, employee board, or division or panel of the Commission, such judge, Commissioner, board, division, or panel shall—

"(i) complete all evidentiary proceedings with respect to such matter within 180 days after its assignment; and

"(ii) with respect to any matter so assigned which involves written submissions or the taking of testimony at a public hearing, submit in writing to the Commission, within 120 days after the completion of all evidentiary proceedings, an initial decision, report, or order containing—

"(A) specific findings of fact;

"(B) specific and separate conclusions of law;

"(C) a recommended order; and

"(D) any justification in support of such findings of fact, conclusions of law, and order.

The Commission, or a duly designated division thereof, may, in its discretion, void any requirement for an initial decision, report, or order, and, in appropriate cases, may direct that any matter shall be considered forthwith by the Commission or such division, if it concludes that the matter involves a question of agency policy, a new or novel issue of law, or an issue of general transportation importance, or if the due and timely execution of its functions so requires. Whenever an initial decision, report, or order is submitted, copies thereof shall be served upon interested parties. Any such party may file an appeal with the Commission, with respect to such initial decision or report. If no such appeal is filed within 20 days after such service, or within such further period (not to exceed 20 days) as the Commission, or a duly designated division thereof, may authorize, the order set forth in such initial decision or report shall become the order of the Commission and shall become effective unless, within such period, the order shall have been stayed or postponed by the Commission pursuant to subdivision (d) or (e).

"(c) The Commission, or a duly designated division thereof, may, upon its own initiative, and shall, in any case in which an appeal is filed under subdivision (b), review the matter upon the same record or upon the basis of a further hearing. Any such appeal shall be considered and acted upon by the Commission, or a duly designated division thereof, within 180 days after the date on which such appeal is filed. Any such decision, report, or order shall be stayed pending the determination of such appeal. Such a review shall be conducted in accordance with section 557 of title 5, United States Code, and such rules (limiting and defining the issues and pleadings upon review) as the Commission may adopt in conformance with section 557(b) of such title 5. The Commission may, in its discretion and on such terms and conditions as it may prescribe, authorize duly designated employee boards to perform functions under this paragraph of the same character as those which may be performed by a duly designated division of the Commission (other than the decision of any appeal under this paragraph which may be further appealed to the Commission).

"(d) Any decision, order, or requirement of the Commission, or of a duly designated division thereof, shall become effective 30 days after it is served on the parties thereto, unless the Commission provides for such decision, order, or requirement, or any applicable rule, to become effective at an earlier date. Any interested party to a decision, order or requirement of a duly designated division of the Commission may petition the Commission for rehearing, reargument, or other reconsideration, subject to such rules and limitations as the Commission may establish. If the Commission finds that a decision, order, or requirement presents a matter of general transportation importance, or if it finds that clear and convincing new evidence has been presented or that changed circumstances exist which would materially affect such decision, order, or requirement, the Commission may reconsider such decision, order, or requirement, and it may, in its discretion, stay the effective date of such decision, order, or requirement. If the Commission reconsiders a decision, order, or requirement, it must complete the process and issue its final order not more than 120 days after the date on which it grants the application for reconsideration.

"(e) The Commission may, in its discretion, extend any time period set forth in this section for a period of not more than 90 days, if a majority of the Commissioners, by public vote, agree to such extension. The Commission shall submit an annual report in writing to each House of Congress setting forth each extension granted pursuant to this subdivision (classified by the type of proceeding involved), and stating the reasons for each such extension and the duration thereof.

"(f) In extraordinary situations in which an extension granted pursuant to subdivision (e) is not sufficient to allow for completion of necessary proceedings, the Commission may, in its discretion, grant a further extension if—

"(i) not less than 7 of the Commissioners, by public vote, agree to such further extension; and

"(ii) not less than 15 days prior to expiration of the extension granted pursuant to subdivision (e), the Commission reports in writing to the Congress that such further extension has been granted, together with—

"(A) a full explanation of the reasons for such further extension;

"(B) the anticipated duration of such further extension;

"(C) the issues involved in the matter before the Commission; and

"(D) the names of personnel of the Commission working on such matter.

"(g) The Commission may, at any time upon its own initiative, on grounds of material error, new evidence, or substantially changed circumstances—

"(i) reopen any proceeding;

"(ii) grant rehearing, reargument, or reconsideration with respect to any decision, order, or requirement; and

"(iii) reverse, modify, or change any decision, order, or requirement.

The Commission may establish rules allowing interested parties to petition for leave to request reopening and reconsideration based upon material error, new evidence, or substantially changed circumstances.

"(h) Notwithstanding any other provision of this act, any decision, order, or requirement of the Commission, or of a duly designated division thereof, shall be final on the date on which it is served. A civil action to enforce, enjoin, suspend, or set aside such a decision, order, or requirement, in whole or in part, may be brought after such date in a court of the United States pursuant to the provisions of law which are applicable to suits to enforce, enjoin, suspend, or set aside orders of the Commission.

"(i) Notwithstanding the provisions of paragraphs (5), (6), (7), and (8), the provisions of this paragraph shall govern the disposition of, and shall apply only to, any matter before the Commission which involves a common carrier by Railroad subject to this part, except that the provisions of other sections of this part pertaining to deadlines in Commission proceedings shall govern to the extent that they are inconsistent with the provisions pertaining to deadlines contained in this paragraph.

"(j) Reports in writing and other written statement (including, but not limited to, any report, order, decision and order, vote, notice, letter, policy statement, rule, or regulation) of any official action of the Commission (whether such action is taken by the Commission, a division thereof, any other group of Commissioners, a single Commissioner, an employee board, an administrative law judge, or any other individual or group of individuals who are authorized to take any official action on behalf of the Commission) shall indicate (i) the official designation of the individual or group taking such action, (ii) the name of each individual taking, or participating in taking, such action, and (iii) the vote or position of each such participating individual. If any individual who is officially designated as a member of a group which takes any such action does not participate in such action, the written statement of such action shall indicate that such individual did not participate. Each individual who participates in taking any such action shall have the right to express his individual views as part of the written statement of such action. The written statement of any such action shall be made available to the public in accordance with Federal law."

(b) Section 17 of the Interstate Commerce Act is amended by inserting therein a new paragraph (14) as follows:

"(14)(a) Any formal investigative proceeding with respect to a common carrier by railroad which is instituted by the Commission after the date of enactment of this subdivision shall be concluded by the Commission with administrative finality within 3 years after the date on which such proceeding is instituted. Any such proceeding which is not so concluded by such date shall automatically be dismissed.

"(b) Within 1 year after the date of enactment of this subdivision, the Commission shall conclude or terminate, with administrative finality, any formal investigative proceeding with respect to a common carrier by railroad which was instituted by the Commission on its own initiative and which has been pending before the Commission for a period of 3 or more years following the date of the order which instituted such proceeding."

DECISION

No. 36639[1]

ILLINOIS CENTRAL GULF RAILROAD COMPANY—SECURITY DEPOSITS—PAYMENT OF DEMURRAGE CHARGES

Decided August 28, 1978

Practice whereby carriers require a cash deposit prior to release of railcars to guarantee payment of future demurrage charges is a rule or regulation which affects charges and the value of services rendered to shippers within the meaning of section 6(1) and is unlawful absent compliance with the tariff publication rules stated at 49 CFR 1300 *et. seq*. Proceeding discontinued.

Raymond E. Belstner for Illinois Central Gulf Railroad Company.

Wandaleen Poynter and *John F. Smith* for Louisville and Nashville Railroad Company.

Cecil F. Etheridge and *Stanley E. Cheatham* for ABC Brick and Supply Company.

Eugene D. Anderson for Iowa Beef Processors, Inc.

Doyle E. Richardson for W. R. Spears, ET UX.

Charles W. Burkett, John A. Daily, John C. Danielson, Charles B. Evans, Fredrick E. Fuhrman, Rodger K. Johnson, Anna M. Kelly, Peter M. Lee, John J. Paylor, R. Bruce Rider, Michael E. Roper, W. A. Thie, and *John S. Walker* for interested railroads.

John F. Donelan, Hollis G. Duesing, Jim Duke, Howard Gould, John J. C. Martin, David Reichert, Renee D. Rysdahl, Richard D. Snyder, Stephen D. Strauss, and *Frederick L. Wood* for other interested parties.

BY THE COMMISSION:

The sole issue in this proceeding is whether carriers may lawfully require shippers to forward a cash deposit, before release of railcars, as security to guarantee payment of any demurrage charges which might accrue thereafter. It is our conclusion that, while the practice may be lawful if reasonable tariff rules are published, section 6 of the act is violated absent such provisions. Carriers will be ordered to discontinue the practice pending publication of tariff provisions pursuant to section 6(1) and the Commission regulations stated at 49 CFR 1300 *et seq*.

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[1] This decision also embraces No. 36590, Louisville and Nashville Railroad Company Petition for Declaratory Order—Security Deposits—Payment of Demurrage Charges and No. 36595, Petition for Declaratory Order—Security Deposits—Payment of Demurrage Charges.

BACKGROUND

The modified procedure was followed. Requested findings not specifically discussed in this report nor reflected in our findings have been considered and found not justified. These proceedings were consolidated by order served January 27, 1978.

No. 36590 was referred to the Commission from the United States District Court for the Eastern District of Tennessee. That case involves a requirement by petitioner Louisville and Nashville Railroad (L&N) that W. R. Spears ET UX (Spears) post a $500 per car cash deposit prior to placement of cars. The deposit, which was increased from $250 per car, has been applied to carload shipments of fertilizer received by Spears at its facilities in Tullahoma and Summitville, TN.

Iowa Beef Processors (IBP), respondent in No. 36595, is a producer of meat and packinghouse products. One of IBP's customers in Chicago, IL, Central Meat Company, receives carload shipments of meat, freight prepaid, and has been required to post a $150 per car cash deposit by Illinois Central Gulf Railroad (ICG) due to alleged outstanding demurrage charges amounting to approximately $76,000. In order to protect its interests, IBP obtained a decree in the United States District Court for the Northern District of Illinois enjoining enforcement of the security deposit program. That court stayed further action pending a decision by this Commission on the legality of the practice.

ICG has also attempted to enforce a $150 per car security deposit requirement against ABC Brick and Supply Company (ABC) which allegedly owes ICG over $6,000 in demurrage charges. ABC, a brick manufacturer in Baton Rouge, LA, sought and obtained an injunction against the ICG program in a Louisiana State court. No. 36639 was referred to the Commission by that court to determine the legality of ICG's security deposit program.

Several parties interested in the outcome of this proceeding have petitioned for, and have been granted leave to intervene.[2] All parties with the exception of New Orleans Traffic and Transportation Bureau, which has withdrawn from the proceeding, have filed statements. In No. 36639, intervenors Chessie System, Indiana Harbor Belt Railroad, Consolidated Rail Corporation, and Burlington Northern take no position with respect to the particular facts involved in controversy between ICG and ABC.

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[2] Florida East Coast Railway, Chesapeake and Ohio Railway Company, Baltimore and Ohio Railway Company, Western Maryland Railway Company, Consolidated Rail Corporation, Indiana (footnote continued on next page)

The security deposit programs.—The security deposit programs are designed to insure collection of demurrage charges and to impress upon shippers the necessity of paying demurrage charges within the time limitations prescribed by the Commission's regulations. Petitioners state that a security deposit is required only of those shippers with a history of late payment or nonpayment of demurrage charges. Shippers subject to the program are required to post a cash guarantee prior to release of railcars. Generally, carriers place these funds in an escrow account.[3] After railcars are returned to the carrier the deposit is refunded, minus a deduction for any demurrage which may have accrued. The deposit on each car is applied exclusively to the demurrage charged to that car. The carriers do not pay interest on funds retained as security.

The security deposit programs are instituted only with respect to a small minority of shippers, all of which are cash basis customers. The suspension of credit privileges, which is often effective in encouraging credit customers to pay demurrage charges, cannot be used to induce the cash customer to pay demurrage charges when due. Thus, the security deposit arrangement is viewed by the railroads as an enforcement tool to be used only when a cash customer fails to pay its demurrage charges on time.

Carriers adopt either of two approaches in determining the amount of the deposit required. L&N bases the amount of the deposit upon an approximation of average past unpaid demurrage charges. Other carriers require a cash deposit of a fixed amount. Intervenor Chessie states that, while $150 is the typical

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(footnote 2 continued)

Harbor Belt Railroad, Grand Trunk Western Railroad, Missouri-Kansas-Texas Railroad Company, Southern Pacific Transportation Company, Seaboard Coast Line Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Denver and Rio Grande Western Railroad Company, and Burlington Northern, Inc., all railroads, have intervened on behalf of petitioners L&N and ICG. Also supporting the railroads position are Association of American Railroads and the National Industrial Traffic League. Louisiana Building Materials Dealers Association, New Orleans Traffic and Transportation Bureau, Inc., and Gift Wrapping and Tyings Association have intervened on behalf of respondents. Also petitions for leave to intervene and statement of fact and argument were filed by Institute of Scrap Iron and Steel Inc. and National Lumber and Building Material Dealers Association. These statements were considered, and the parties will be admitted as intervenors in this proceeding.

[3] L&N places the deposit money with its general funds.

requirement, its program is flexible and is designed to cover the largest bill likely to be incurred in ordinary service, not the average charge. While there have been instances where the size of the deposit has been reduced below $150 per car, there have also been occasions when the demand has been greater, in one case as much as $5,000 per car. All railroads concede that there are no tariff provisions which authorize the security deposit program.

Jurisdiction.—ABC takes the position that the Commission has no jurisdiction to establish rules and regulations which deal with the collection of charges which arise after delivery to a shipper. This reasoning is apparently based upon ABC's reading of section 3(2) of the act as being inapplicable to charges such as demurrage which accrue subsequent to delivery of freight. We believe that sections 1(6) and 1(11) provide an adequate jurisdictional basis. Furthermore, the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. 801, amended section 1(6) of the act to incorporate specific reference to our authority concerning rules and regulations affecting demurrage charges.

Section 6.—Section 6(1) requires carriers to file with the Commission, and to keep open for public inspection, tariff schedules showing all rates and charges for transportation services. In addition, the tariff schedules must plainly state:

> all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of service rendered to the passenger, shipper, or consignee.

The threshold question which must be answered in this proceeding is whether section 6(1) mandates tariff publication of the security deposit program. It is our opinion that tariff publication is required because the arrangement constitutes a rule or regulation which affects the charges and the value of service rendered to shippers.

According to the evidence submitted, certain shippers have been required to forward cash deposits ranging from $150 to $5,000 per car before railroads will release railcars. When multicar shipments are involved, the financial burden of the deposit requirement could be substantial. For example, respondent Spears would have been required to post a cash deposit of $10,500 at $500 per car for a 21-car shipment.

Petitioners contend that these programs do not involve an additional charge within the meaning of section 6(1), but are merely deposits used to guarantee collection of already published charges;

i.e., demurrage and detention charges. We disagree with this position, because at the time a deposit is required demurrage charges are entirely speculative. Furthermore, petitioners generally establish the deposit at a level sufficient to cover the largest demurrage bill likely to be incurred in ordinary service.[4] It is inherent in this practice that shippers will, on the average railcar, be required to forfeit an amount of funds which will exceeed the demurrage eventually charged. Thus, in order to secure cars, certain shippers are required to deposit money with the railroads which will never be used to offset demurrage charges. These shippers not only are deprived of the use of their money, but also lose the interest income which would have accrued under normal circumstances.

In light of these considerations, we must conclude that the security deposit rule does constitute an additional charge pertaining to demurrage and results in a different service than that received by other shippers not subject to the requirement. Accordingly, the security deposit programs, as presently implemented, are unlawful under section 6(1) and the Commission's regulations set forth at 49 CFR 1300.4(h) and 49 CFR 1300.61(a).

The purpose of statutory requirements that tariffs containing all rates and charges be filed and published is to shut out opportunities for discrmination and favoritism. See *Atchison, T.&S. Ry. Co.* v. *Bourziden*, 307 F. 2d 230, 234 (10th Cir. 1962). These considerations are pertinent here, and require inclusion of security deposit regulations in published tariffs. Carriers should not be allowed to strictly enforce security deposit programs against certain shippers, while absolving other favored shippers. Therefore, tariff rules must be published, and open for public inspection to insure that any security deposit regulation instituted is enforced equitably with respect to all shippers which fail to pay lawful demurrage charges.

Other arguments.—We do not believe that either the Commission's credit regulations[5] or section 7 of the Uniform Straight Bill of Lading[6] can be read in such a way as to override either section 6(1) of the act or the Commission's regulations requiring publication of a tariff rule before action of this nature can be taken by a carrier.

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[4] Respondent ABC indicates that although the average demurrage accrued on shipments between January 1975 and October 1977 was approximately $6 per car, ICG required a $150 per car deposit.

[5] 49 CFR 1320.1.

[6] See *Bills of Lading*, 52 I.C.C. 671 (1919) and *Domestic Bill of Lading for Live Stock Contract*, 64 I.C.C. 357 (1921).

Section 1320.1 states that a carrier: "upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified in this part, may relinquish possession of freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges." Petitioners contend that the security deposit requirement is simply a "precaution" to assure payment of demurrage charges within the meaning of this regulation. We disagree, because the credit regulations were not intended to displace the tariff publication requirements of section 6. Tariff publication is necessary when a "precaution" taken under the guise of section 1320.1 results in an additional charge for transportation services.

Section 7 of the Uniform Straight Bill of Lading[7] cannot be interpreted to support the security deposit requirement. The provisions of that section which allow a carrier to require "a prepayment or guarantee of charges" cannot be read independently of the preceding paragraph which speaks of the payment of tariff charges prior to relinquishment of possession of freight. The guarantee provision does not apply to demurrage charges; it is concerned only with those charges which accrue prior to delivery of railcars.[8] If we were to find otherwise, a consignor which does not sign the nonrecourse provision of section 7 would be liable for demurrage incurred by the consignee.

Implementation.—We anticipate that, in response to this decision, carriers will publish tariff regulations which authorize the security deposit practice. We cannot, at this time, rule on the lawfulness of any particular security deposit program.[9] Such a decision would necessarily depend on the reasonableness of the terms and conditions of any tariff regulation subsequently enacted. However, shippers have raised some questions pertaining to the implementation of the arrangement which must be discussed before tariff provisions are published.

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[7] Section 7 of the Uniform Straight Bill of Lading reads as follows: "Sec. 7[1] The owner or consignee shall pay the freight and average, if any, and other lawful charges accruing on said property; but except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stiuplation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. [2] Nothing herein shall limit the right of carrier to require at time of shipment the prepayment or guarantee of the charges."

[8] This situation should be distinguished from that in *Illinois Steel Co.* v. *B. & O. R. Co.*, 320 U.S. 508, 515-516 (1944) where the court held that section 7 allows for a guarantee of "unanticipated" freight charges. Although the "unanticipated" charges were due to actions subsequent to the release of railcars, they affected only those freight charges which accrued prior to the release of freight.

[9] We cannot rule on respondent's contentions that the security deposit requirement violates sections 1(4), 1(5), and 1(11) of the act, since these sections would require a determination of the reasonableness of a particular program. However, as discussed below, we are in agreement with the concept of a security deposit and do not feel that it is *per se* unreasonable or otherwise unlawful.

Respondent ABC contends that ICG should not be allowed to place it on a security deposit program as a result of its refusal to pay any demurrage charges until the carrier has complied with all provisions of the demurrage tariff and has presented an accurate demurrage bill. We agree that a shipper should not be obligated to pay demurrage bills if a carrier fails to comply with the notice provisions contained in the demurrage tariff. See *Arizona Sand & Rock Co.* v. *Southern Pac. Co.*, 273 I.C.C. 201, 204 (1948). Furthermore, there should be no obligation to pay erroneous demurrage bills or those which fail to identify demurrage charges on a per car basis.[10] If there is no obligation to pay demurrage charges, it would be unreasonable to implement the security deposit requirement for failure to pay those charges. Carriers should check to ascertain that demurrage computations are accurate prior to imposition of a security deposit. The threat of a cash guarantee should not be used as a means to coerce payment of erroneous bills or charges.

ABC also claims that it is entitled to use pending loss and damage claims to set off demurrage charges as they accrue. Thus, this shipper takes the position that it cannot be placed on a security deposit program because it refuses to pay demurrage charges which would be offset by pending loss and damage claims. We disagree.

It is well settled that carriers are required to collect the full amount of lawful tariff charges from all shippers in cash. In *Chicago & N. W. Ry.* v. *Lindell*, 281 U.S. 14, 17 (1930), the court stated that a carrier "may not accept services, advertising, property or a release of a claim for damages in payment for transportation."[11] Absent a court proceeding where counterclaims are allowed, claims for damages filed by a shipper bear no relation to the carrier's duty to collect all lawful tariff charges in cash. This requirement is necessary to prevent discrimination effectively and to insure uniform treatment of all shippers. If we were to allow a direct setoff as proposed by ABC, carriers could provide rebates in the form of setoffs to preferred customers and, therefore, circumvent the prohibitions of section 6.[12]

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[10] ABC has introduced evidence that ICG has been in error on over 40 percent of its demurrage bills. ABC also contends that ICG has presented demurrage bills which do not break down the charges on a car-by-car basis. Spears alleges that demurrage bills from L&N also contain over 40 percent error, but presents no evidence to support that position.

[11] See also *Norton* v. *Shotmeyer*, 72 F. Supp. 188 (D. N.J. 1947) and *United States* v. *Pennsylvania RR Co.*, 308 F. Supp. 293, 295 (E.D. Pa. 1969).

Neither can we read *In Re Yale Express*, 362 F. 2d 111 (2d Cir. 1966) as support for the position that a shipper may deduct loss and damage claims from unpaid freight charges outside the context of a court proceeding. *In Re Yale*, a Chapter X bankruptcy proceeding, held that a surety for loss and damage claims of an insolvent carrier obtains an interest in receivable freight charges held as security for the carrier's performance. That case simply allowed the surety, through subrogation, to apply receivable freight bills to offset loss and damage claims for which the surety became liable upon insolvency of a motor carrier. To the extent that setoffs were allowed, the transactions were not between a carrier and a shipper and, therefore, were not fraught with the danger of discrimination which was the basis of the decision in *Lindell*.

Conclusion.—Petitioners have relied on *New York Board of Trade* v. *Director General*, 59 I.C.C. 205 (1920) and *Sample* v. *Atchison, T. & S. F. Ry. Co.*, 139 I.C.C. 324 (1928), for the position that the Commission has allowed similar security deposit programs in the past. While neither of these cases is pertinent with respect to the question of whether tariff publication is required by section 6(1), they do indicate that the Commission has previously supported the concept of a prepayment or guarantee of charges.[13] See *New York Board of Trade, supra* at 209.

The evidence presented in this proceeding establishes that a security deposit program can be an effective method of encouraging prompt payment of demurrage charges. ICG indicates that of the 136 customers which have been required to post a security deposit, only 21 remain on the program. Only five shippers have been subject to the requirement more than one time. L&N has had similar experiences with the 25 customers subject to the arrangement, as 10 are no longer required to post a security deposit. Furthermore, we note that carriers are often forced to pay substantial legal expenses to recover demurrage charges. Intervenor Southern Railway, for example, claims that in one instance it paid approximately $5,000 to collect $1,139.50 in outstanding demurrage charges. In many cases, a security deposit will obviate the necessity for these expenditures.

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[12] In *Loss and Damage Claims*, 340 I.C.C. 515, 544 (1972) we noted that carrier processing of loss and damage claims sometimes allows carriers to engage in discriminatory practices by admitting liability and quickly settling claims of favored shippers while denying or delaying the settlement of claims of other shippers. We feel that the potential for discrimination would be even greater if we allowed the direct setoffs as proposed here.

[13] Intervenor Chessie System relies on *Sample*, among other cases for the position that tariff publication of regulations of this nature is not necessary. The only case among those cited by Chessie which considered the section 6(1) issue, *Domestic Bill of Lading and Live Stock Contract, supra*, stated at p. 364 that: "The rules and regulations constituting the forms of bills of lading affect 'the value of service rendered to the passenger, shipper, or consignee' within the meaning of section 6 of the interstate commerce act." The bill of lading is also currently published in the Uniform Freight Classification.

We are aware that several problems will have to be resolved regarding implementation of any security deposit program. First, the amount of the deposit must be established at a level which will insure the collection of anticipated demurrage charges while at the same time avoiding an undue financial burden on shippers subject to the program. A large deposit could create considerable difficulties for small shippers with limited resources, especially when multicar movements are involved.[14] Furthermore, we are concerned with the criteria for determining which shippers would be subject to the program. Unlike extension of credit which involves a judgment of the financial ability of a shipper, a security deposit requirement should be determined exclusively by past performance in paying demurrage charges. Any security deposit regulation implemented must apply to all shippers which fail to pay demurrage charges. Also of concern to the Commission is the danger that the threat of a security deposit could be used to cause a shipper to pay disputed demurrage charges, the feasibility of alternative forms of security,[15] and problems associated with accurate deductions from any deposit retained.[16]

We will refrain, at this time, from recommending tariff provisions in order to allow carriers to implement rules which they feel would be most effective in collecting demurrage charges from delinquent shippers. The reasonableness of any tariff provision subsequently enacted will depend upon carrier's reaction to the problems noted above. Intervenor Burlington Northern has recommended that a rulemaking be instituted to establish security deposit regulations. We do recognize the possibility that a rulemaking may be necessary at some time in the future. However, in the interim, we anticipate that carriers desiring to continue the arrangement will enact reasonable tariff provisions, and enforce them uniformly.

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[14] We are also aware that a shipper receiving daily shipments could, if carriers are slow in returning deposits, have large sums of money on deposit with a carrier. For example if 2 weeks of time elapses between payment of a deposit and delivery of a refund check, a shipper which receives two cars per day each workweek would have $3,000 on deposit with the carrier before a refund is made on a $150 per car deposit. Reasonable tariff provisions would have to make an accommodation to avoid this situation.

[15] ABC offered to post a $10,000 security bond with ICG to insure payment of demurrage charges. The offer was refused in favor of a $150 cash deposit.

[16] As noted above, ABC has demonstrated that a large percentage of the demurrage bills presented are inaccurate. Carriers enforcing security deposit programs must take extra precautions to insure that demurrage charges deducted from funds held in escrow are accurate. It would be unreasonable for a carrier to deduct excessive amounts from a deposit and require a shipper to incur time consuming and expensive litigation to recover those funds.

We find that the practice of requiring a cash deposit to guarantee payment of demurrage charges is a rule or regulation within the meaning of section 6(1) of the act. Absent compliance with the Commission's tariff publication regulations set forth at 49 CFR 1300 *et seq.*, petitioners shall discontinue the practice of requiring a security deposit to guarantee payment of demurrage charges. This decision does not significantly affect the quality of the human environment.

These findings will be contained in a notice issued by the Commission to be published in the Federal Register.

COMMISSIONER STAFFORD, dissenting:

As here pertinent, section 6(1) clearly provides that the requirement of tariff publication involves only those rules and regulations affecting rates or value of service. Imposition of a security deposit does not affect the charge, but rather insures collection of lawful charges. On its face the term "value of service" is nebulous. As applied to the present proceedings, it becomes impossible to ascertain or quantify. It is clear, however, that no diminution of transportation service will result from a shipper having to pay a security deposit. It is simply conjecture to assume that shippers will lose interest on the money deposited or suffer other dire consequences. In reality, shippers will probably suffer nothing more than minor inconveniences caused in the first place by their own negligence in meeting their obligations.

Simply because security deposits are not tariff items does not connote that rail carriers may act unjustly or discrimnatory. (See section 1(6).) It may well be in the case of ABC Brick and Supply Company, for example, that a $150 deposit may be an unreasonable practice when the average per car demurrage to that company is only $6.

Accordingly, I would decide these proceedings on the basis that security deposits are not tariff items pursuant to section 6(1) and otherwise dispose of the cases on the basis of whether section 1(6) violations exist.

It is ordered:

The Institute of Scrap Iron and Steel, Inc. and National Lumber and Building Material Dealers Association are allowed to intervene in this proceeding.

Petitioners shall discontinue practice of requiring a cash deposit to guarantee payment of demurrage charges until such time as lawful tariff provisions are published in compliance with the Commission's regulations set forth at 49 CFR 1300 *et seq.*

This proceeding is discontinued.

By the Commission, Chairman O'Neal, Vice Chairman Christian, Commissioners Murphy, Brown, Stafford, Gresham, and Clapp. Commissioner Stafford dissenting. Commissioner Murphy not participating.

EX PARTE NO. 55 (SUB-NO. 24)

REVISED RULES OF PRACTICE

Decided March 1, 1977

Upon investigation and consideration of views, arguments, and representations of the parties, tentative conclusions reached regarding existing rules of practice and certain additional rules proposed. Additional comments due on or before April 4, 1977. Appropriate order entered.

Hollis G. Duensing and *Joseph J. Nagle* for railroads and interested railroad associations.

Eugene D. Anderson, Eldered N. Bell, Jr., John M. Cleary, John F. Donelan, Thomas D. Donis, Thomas A. Egner, Jr., Jon C. Hansen, Frank Hiljer, Jr., Steven J. Kalish, Daniel J. Sweeney, and *Frederic L. Wood* for shippers and interested shipper associations.

Harry C. Ames, Jr., Pansy Beroth, John W. Joyce, Marshall Kragen, William W. Pugh, and *Sherman D. Schwartzbert* for motor carriers and interested motor carrier associations.

James E. Armstrong and *Dellon E. Coker* for Secretary of the Army, on behalf of the Department of Defense.

Dowell H. Anders, James J. Stapleton, and *Gerald M. Tierney* for the Federal Highway Administration, Department of Transportation.

Jerome A. Atkinson, Virginia H. Knauger, Robert P. Palmer, and *Robert F. Steeves* for the Office of Consumer Affairs, Department of Health, Education and Welfare.

Daniel F. Rogers for the State of New Mexico State Corporation Commission.

Harris G. Andrews, Paul D. Augenend, Harry N. Babcock, James F. Bromley, Herbert M. Canter, J. Raymond Clark, John T. Coon, J. G. Dail, Jr., Dan Felts, Thomas Harper, Tom Harper, Jr., Richard J. Lee, Gordon P. MacDougall, William G. Mahoney, Timothy Mashburn, S. Walton Maurras, Thomas F. McGrath, L. Manning Muntzing, Wallace H. Nations, James R. Paschall, John J. Paylor, Phillip Robinson, Richard R. Sigmon, Bertram S. Silver, Lawrence V. Smart, Jr., Don A. Smith, Mert Starnes, Phineas Stevens, Paul F.

Sullivan, James H. Sweeney, and ***Earle V. White*** for other interested parties and pro se.

INTERIM REPORT OF THE COMMISSION

BY THE COMMISSION:

The Commission, pursuant to a recommendation by its Blue Ribbon Staff Panel in 1975, began an evaluation of its Rules of Practice with the aim of updating, clarifying, and improving them. Subsequently, section 305 of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law No. 94-210, 90 Stat. 31, charged the Commission with a duty to review and revise its Rules of Practice in the rail area within 1 year of the date of enactment. Pursuant to its commitment resulting from the Blue Ribbon Panel's recommendation and its statutory duty, certain proposed revised Rules of Practice have been compiled which are designed to clarify and simplify our existing rules and make more efficient the procedures employed in proceedings before the Commission arising under the Interstate Commerce Act and related acts. Such rules were set forth in a Notice of Proposed Rulemaking published November 8, 1976, and written comments from interested members of the general public were invited.

REPRESENTATIONS

The Commission has received 38 comments[1] from a variety of parties including railroads, shippers, motor carriers, attorneys, practitioners, related associations, and Federal and State governmental bodies. All parties submitting comments are listed in appendix A hereto. The Commission is gratified by the interest shown by these parties as evidenced by submissions which are clearly the product of considerable time and effort. A synopsis of each comment identified by the submitting party is contained in appendix B.

As revealed by the comments, the major areas of inquiry and criticism with respect to the proposed action are:

(1) Computation methods and page and time limitations;

(2) Employee-representatives and whether they may appear before the Commission in the dual capacity of advocate and witness;

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[1] A number of comments received after the filing deadline set in the Notice of Proposed Rulemaking of November 8, 1976, have nevertheless been considered in order to insure that all interested parties have had an opportunity to present evidence and to provide this proceeding with the broadest possible scope of information on which to base our determination.

(3) Protests against applications and against revisions to rail rates and charges;
(4) Discovery procedures;
(5) Bench decisions;
(6) Intervention, especially in rail proceedings;
(7) Oral argument in lieu of briefs;
(8) Administrative appeals from first decision of a divison or the Commission;
(9) Number of counsel per side at oral argument; and
(10) Compliance with the Railroad Revitalization and Regulatory Reform Act of 1976.

I. *Time and page limitations and computation methods*

A. *Time limitations.*—Considerable opposition is presented by both attorneys and practitioners to the retention of rule 4(b) which states that the date of actual receipt by the Commission of a pleading, rather than the date of deposit in the mails, shall be deemed the date of filing. The basic dissatisfaction expressed in the comments is that the refusal to extend the time limitations on filing with the Commission unjustly discriminates against attorneys and practitioners located outside the Washington, D.C., area. As explained by one attorney, in order to assure receipt by the Commission on the due date, an attorney or practitioner located outside the D.C. area must mail his pleadings to the Commission and all other parties several days prior to the due date. This in effect limits the time within which documents may be prepared. The situation is further aggravated when the pleading to be filed is an administrative appeal which, according to the proposed rules, must be filed within 30 days after date of service of the decision, order, or requirement. The same attorney asserts that invariably the decision, order, or requirement is received by the non-Washington attorney or practitioner several days after the date of service. Under such circumstances, the time available for preparation, reproduction, filing, and service of pleadings is further reduced. The identical problem is encountered when, as noted by another attorney, a party is required to file a statement under modified procedure within 30 days from the date of service of the order, yet that party does not receive the order until several days after the date of service.

While the parties generally acknowledge that the imposition of more stringent time constraints is directed at reducing administrative delay, their responses reflect the belief that in the process their rights are being eroded. Accordingly, several alternative proposals were recommended. It is suggested in two of the representations that in lieu of the proposed rule, all pleadings be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. Numerous responses recommend the adoption of an additional 3-day period when service is made by mail; one response proposes an additional 5-day period. Another representation indicates that the proposed rule should be modified to additionally permit filing at any Commission field office. Still another response suggests that all parties be required to mail all pleadings to the Commission and to all other parties at least 2 days prior to the due date.

Comments which specified particular rules containing time limitations considered restrictive were also received. Among those rules included were the proposed rules providing for discovery, modified procedure, and administrative appeals, both rail and nonrail. The overriding concern expressed in most comments received on the subject of discovery is that use of discovery would be virtually impossible in light of the time limitations imposed. On the subject of nonrail administrative appeals, one Government agency suggests that under the proposed rules, assuming a bench decision is permitted, where such decision is issued, petitions for administrative appeal should be permitted to be filed within 30 days after the transcript becomes available, rather than 30 days after the date of service of the decision, order, or requirement. On the subject of rail administrative appeals, several attorneys recommend that the original 30-day limitation replace the proposed 20-day limitation on the time for filing.

Only one comment received specifically criticizes the proposed rules for failing to set sufficiently strict time limitations. That comment concerns the proposed rule governing the filing of briefs and suggests the reduction of the time for filing briefs from 45 to 35 days from the close of the hearing unless otherwise ordered by the Commission.

B. *Time computation.*—Comments received regarding the proposed rule which prescribes the method of time computation reflect the need for certain modifications of that rule. One Government agency claims that under the proposed rule 21(a) it is unclear on what date a pleading should be filed when a party is directed to file such pleading on a day which happens to be a Saturday, Sunday, or legal holiday. Another modification suggested is the incorporation in the rule of a provision to cover situations where time is measured backwards from a certain date.

Several responses contain expressions of dissatisfaction with the deletion from rule 21(c) of the provision for securing an extension of time for filing, within a period less than 10 days prior to the due date in a situation involving extraordinary circumstances. It is suggested in one representation that the deadline for the filing of a request for postponement of the date of filing briefs or other documents be changed from 10 to 5 days before the due date. Another response claims there is a need to clarify the words "other documents" contained in that rule.

C. *Page limitations.*—The comments to the rules providing for page limitations on exceptions and petitions for administrative appeal are generally unfavorable. Responses contain expressions of concern that the proposed limitations could prove detrimental where a lengthy or complex initial or tentative decision is involved, particularly in the areas of rates or finance. Several comments assert that where the decision is lengthy or complex, it would be difficult to specifically address all issues contained in the decision and still satisfy the page limitation. Other responses criticize the proposed page limitations as arbitrary. It is pointed out that depending on who issues the initial decision the same proceeding could be subject to either a 30- or a 10-page limitation.

Alternatives to the proposed page limitations are contained in the representations. A party representing the interests of motor carrier lawyers suggests that the proposed rules be modified to allow relief from the page limitations upon a showing of extraordinary circumstances. Alternatively, one shipper, while favoring the proposed 10-day limitation with respect to petitions for administrative review, recommends that with respect to exceptions, the number of pages permitted to be filed be a number not to exceed the number of pages contained in the initial decision to which exception is taken. Another response proposes that the 30-page limitation apply to both exceptions and petitions for administrative review. Still other suggestions received from attorneys include the following: (1) the elimination of page limitations on exceptions, (2) the limitation to 50 pages of exceptions in cases in which oral argument has been directed and no written briefs have been filed, (3) an increase in the page limitation on exceptions to 70 pages, (4) the limitation of exceptions to 30 pages exclusive of index and appendixes, plus 1 additional page for each page that the initial decision exceeds 30 pages, and (5) an extension to 30 pages of petitions for administrative review where the petition subject to the limitation is the first appeal of a decision rendered by a division or the entire Commission or where the appeal is from a decision which reverses or modifies a prior report. In addition to these suggestions, attorneys representing shipper interests urge that the rule be modified to permit a maximum of 30 pages when reproduced by standard typographic printing and 50 pages when reproduced by other processes.

II. *Employee-representatives: Dual capacity appearances before the Commission*

Several comments were received with respect to the issue of appearing before the Commission in the dual capacity of advocate and witness. One practitioner comments that precluding attorneys from appearing as witnesses before the Commission, while permitting practitioners who are neither attorneys nor full-time employees to appear before the Commission, is justified by the many years of service of the practitioners to the transportation industry in various capacities. Accordingly, he proposes the amendment of the canon prescribing standards of ethical conduct so as to require (1) practitioners to conform only to the standards of ethical conduct set forth therein and (2) attorneys to conform to the standards of ethical conduct required of practitioners before the courts of the United States as well as to those set forth in the canons. He feels that such amendment would clearly indicate that practitioners who are neither attorneys nor full-time employees are permitted to appear before the Commission in the dual capacity of advocate and witness.

One motor carrier suggests that the proposed rules be revised to provide that full-time employee representatives be permitted to appear before the Commission on behalf of their full-time employers in the dual capacity of representative and witness. As envisioned by that carrier, who who is a bona fide officer or a full-time employee of an individual, partnership, corporation, or association may be qualified by the employer as a full-time employee representative. Additionally, one admitted to practice either as an attorney or a practitioner who is also a full-time employee could be a full-time employee representative, but only if so qualified by the employer. Once thus qualified, that individual could not enter an appearance for anyone other than his full-time employer.

Revision of various definitional and other rules is also suggested by this motor carrier so that those rules would comport with its suggested additional rules regarding use of full-time employee representatives. One such revision suggested is the creation of an exception to the rule excluding corporations and firms from practice before the Commission in the case where authorized employee signatures are maintained in a register provided for in the additional rules.

The comment of this motor carrier also expresses some dissatisfaction with the code of ethics. It proposes to eliminate any reference to any code of ethics other than that appended to the Rules of Practice. It is suggested that attorneys should no longer be required to conform to the standards of conduct required of practitioners before the courts of the United States. Instead, this motor carrier urges that all parties appearing before the Commission be subject only to the code of ethics contained within the Rules of Practice.

Proposed rule 11 concerns disciplinary action against practitioners. Another carrier seeks to clarify the fact that the reference in this rule to the code of ethics in appendix A is not to be construed to prevent a carrier's representative from appearing before the Commission in a dual capacity.

III. *Protests against applications and against revisions to rail rates and charges*

Comments received on the subject of protests to applications (rule 40) deal with various aspects of the rule. One response urges the Commission to modify the rule so as to discourage protests which are filed in order to be dilatory. While that party offers no immediate solution, it does suggest that, as a last alternative, a party could be barred from filing a protest to an application for any part of the same authority for 1 year. A response of an attorney representing railroad interests requests clarification of the rule to indicate its inapplicability to rail abandonment or merger proceedings. Another party urges the Commission to strictly enforce the time limitations on filing protests imposed by the rule.

There were varied responses to the deletion from that rule of the provision that failure to file a protest shall not prejudice subsequent participation in the proceeding. While one practitioner voices his support for such deletion, another simply stated that it would benefit the carriers at the expense of the public. Still another party submits that the actual effect of the deletion is to prejudice the subsequent participation in the proceeding by a party who fails to file a protest. With respect to the comment to the proposed rule which interprets the rule as allowing an appropriately supported petition for leave to intervene when the deadline for filing protests is missed, that same party requests that the Commission define the phrase "appropriately supported."

Responses to the providing for protests to revisions of rail rates and charges [rule 42(g)] include a recommendation that the language of the rule be changed to provide that a protest "should be" included rather than "shall" include a verified complaint. It is also suggested that the verified complaint be limited to a request that the protested matter be suspended and investigated. Another response seeks clarification as to whether a formal complaint and request for investigation could be used where a protest against revised rail rates and charges could not because of lack of information necessary for verification. Assuming such alternative procedure is sanctioned, that party also seeks clarification regarding time limits on filing, burden of proof requirements, and keep account requirements. One other response proposes the addition of a sentence which makes strict compliance with the rule mandatory. Additionally, one comment queries whether the proposed rule should make reference to the rules on market dominance.

IV. *Discovery*

Only one response, received from an attorney representing railroad interests, endorses the proposed changes in the discovery rules, which make all discovery procedures available only upon the filing of a verified petition and the showing of good cause therefor. It is suggested, however, in that response that the Commission establish an expedited schedule for handling petitions for discovery.

The majority of the other comments regarding the proposed discovery rules are unfavorable. The overriding concern, as expressed in numerous comments, is that the extremely restrictive conditions on the availability of discovery imposed by the proposed rules would make use of discovery virtually impossible. In objecting to the requirement that any party seeking discovery must file a verified petition, one practitioner urges that experience has shown that discovery upon petition is in effect no discovery at all. Several attorneys argue that the severe time constraints imposed by the proposed rules make it nearly impossible to obtain discovery. Several comments indicate that this is particularly true under modified procedure. Those same attorneys, however, feel that the requirement of an order of the Commission approving the use of discovery would provide valuable protection to the parties and reduce the likelihood of abuse.

Attorneys representing shipper interests on the other hand point to the requirement that all discovery requests be subject to prior

Commission approval as the most disturbing aspect of the revised discovery rules. They suggest that, rather than abandoning the liberalized discovery rules which the Commission adopted only 2 years ago, the Commission ought to tighten up the administration of its existing rules. One recommendation is the more effective use of protective orders. Another proposal made by a practitioner is that cases involving discovery be promptly referred to an Administrative Law Judge or a "motions" judge designated to rule on discovery requests.

The comment submitted by one railroad expresses concern over a discovery process in which all discovery could be effectively precluded merely by Commission delay or inaction.

The response of one Government agency contains assertions that the proposed discovery rules will hamper full disclosure and could result in substantial delays. It is suggested by another party that if delay is the primary abuse, the rules could be revised to require the filing of discovery requests which a complaint, answers, or other pleading.

Several parties in urging retention of the present discovery rules, indicate that the present, as opposed to the proposed rules, are in accordance with the Federal Rules of Practice and are consistent with the pronouncements of the Administrative Conference of the United States.

A party representing the interests of motor carrier lawyers proposes modification of the rules so as to allow the use of interrogatories and requests for admission in proceedings other than those under sections 206 and 209 of the Interstate Commerce Act without first having to file a verified petition showing good cause therefor.

While practitioners as a group voice no major objection to the proposed requirement that all discovery procedures be available only upon the filing of a petition and a showing of good cause, they recommend eliminating the requirement of a Commission order where there is voluntary discovery by mutual consent. They also suggest the establishment of expedited time schedules for filing of petitions and replies and for disposition by the Commission of those petitions.

Another comment of an attorney representing motor carrier interests contains a recommendation that the discovery rules be modified to clearly provide that where good cause is demonstrated and that where discovery is not an obviously dilatory tactic, the Commission will grant reasonable extension of dates for hearing or for submission of initial statements under modified procedure. One Government agency proposes that if verified statements are required for discovery, an approved form of verification should be appended to the proposed rules. One attorney comments that written interrogatories and requests for admission should not be subject to the proposed restrictions on discovery in general.

Shipper interests recommend modification of the rules to require that interrogatories and requests for admissions be served at least 20, rather than the proposed 10, days before the commencement of oral hearings or before the date for serving any statement on modified procedure.

Certain attorneys propose that the protection of privileged or proprietary information contained in computer runs, punch cars, or tapes be extended to apply to such information contained in any records. They also request clarification of the rule regarding written interrogatories with respect to (1) the number of copies of interrogatories required to be filed, (2) whether answers must be filed with the Commission, (3) the form of service of answers, and (4) the number of copies of answers, if any, to be filed with the Commission.

V. *Bench decisions*

With the exception of a comment by an attorney representing railroad interests which supports the expansion of a hearing officer's authority to issue bench decisions, all responses to this proposed rule are negative. One comment expresses the fear that the authority to render bench decisions is too broad and could be abused in complex rate or finance matters. Attorneys representing shipper interests suggest that langauge be included in the rule to the effect that bench decisions should not be used in proceedings involving complex issues of fact or law, or in unopposed proceedings.

A party representing the interests of motor carrier lawyers recommends that the rule be amended to give hearing officers the expanded authority (1) to rule on matters, regulate the procedure, and issue subpenas, after the proceeding is assigned but prior to the hearing, (2) to decide motions involving final determination of the merits of the proceeding, and (3) to announce the decision after the close of the hearing regardless of whether briefs are filed.

One attorney-practitioner objects to the trend toward bench decisions in motor carrier operating rights cases. He argues that motor carrier operating rights cases so simple as to permit bench decisions to become the norm should instead be assigned for modified procedure.

Another response asserts that an inconsistency exists between this proposed rule and the rule providing for oral argument as an alternative to the filing of written briefs. It is noted that while the former rule indicates that a hearing officer may act upon motions submitted to him "after the filing of briefs," the latter rule permits, under certain circumstances, the elimination of briefs.

VI. *Intervention*

Noting the absence of guidance regarding the appropriate circumstances for filing a petition for leave to intervene, one Government agency sets forth in its comments a proposal for modification of the rule. It proposes that all parties may intervene in proceedings before the Commission if their interests are not adequately represented and that the interests of interveners shall be consolidated when possible.

The comment of a practitioner expresses dissatisfaction with the removal of section 5 proceedings from the list of proceedings to which the proposed rule applies. He claims that ending the right to participate in section 5 proceedings merely by entry of an appearance (without requiring the filing of a petition for leave to intervene) will substantially reduce public participation in important matters, such as proposed railroad mergers and trackage rights applications.

The response of one Government agency asserts that the so-called *Schaeffer* rule (*Schaeffer Extension—New York City,* 106 M.C.C. 100 (1967)), which requires applicants to submit shipper support together with their application, does not apply to evidence introduced by interveners.

Another Government agency comments that since the proposed rule regarding intervention without participation applies to abandonments, reference should be made in the rule to section 1(a) of part 1 of the Interstate Commerce Act, which pertains to abandonments. Another party also notes that section 1(a), rather than 1(18) of the act, now governs abandonment proceedings. However, it concludes that the rule authorizing participation without intervention is inconsistent with section 1(a) and new abandonment regulations, which encourage early notice of participation or opposition.

A response by shipper interests recommends extending the application of the rule permitting entry of an appearance without requiring a petition for leave to intervene to any proceeding in which the justness or reasonableness of any rate, rule, charge, or other provision of a tariff is at issue and the Commission has ordered that the proceeding should be heard under the modified procedure.

VII. *Oral arguments in lieu of briefs*

Response to the proposed rule permitting oral argument in lieu of brief is generally fovorable. One party, however, argues that the rule discriminates against those parties with limited resources as well as those having a restricted or special interest in a particular proceeding. Another party complains that interested parties will have greater difficulty obtaining access to hearing transactions than briefs. Shipper interests request that the rule be amended to include a prohibition against its use in proceedings involving complex issues of fact and law or in unopposed proceedings.

While practitioners take no position on this proposed rule, they suggest that, if the rule is adopted, it should be amended to provide that notice of oral argument be given to the parties at the opening of the hearing. The comment of railroad interests, which support the proposed rule, also recommends providing parties with such notice on the first day of the hearings or as soon after commencement of the hearing as possible. That comment additionally suggests that the presiding officer ought to be required to consult with the parties participating in the hearing before oral argument is substituted for written briefs. Several parties go one step further in proposing amendment of the rule to provide that oral argument ought to be substituted for written briefs only if all litigants concur. One party recommends inclusion in the rule of a sentence to the effect that provision in the notice of hearing that oral argument will be heard, or agreement by all parties to oral hearing will be considered reasonable notice.

The comment of one Government agency expresses satisfaction with the proposed rule regarding oral arguments in lieu of written briefs.

VIII. *Full appeal from first decision of division or Commission*

Comments received express strong objection to the proposed rules dealing with administrative appeals. Numerous comments urge modification of the rules to provide for one level of mandatory appellate review of every decision, regardless of who issues the first decision.

The comment of railroad interests criticizes as "severe, unwarranted and extremely unreasonable" the restriction on the railroads' right to a first appeal of a division or Commission decision when it is the initial decision. That comment states that construing the proposed rule pertaining to officers' initial decisions together with the proposed rules regarding administrative appeals, such rules appear to preclude the filing of exceptions to a division decision even though it is the first decision rendered in a rail proceeding. Furthermore, the comment claims that the proposed rules also appear to preclude the filing of a petition for reconsideration to such a division decision.

Railroad interests also recommend clarification of the rules to define those division decisions which are initial decisions or, in the alternative, to permit the filing of an unlimited petition for reconsideration.

Two comments raise objections, on the grounds of denial of due process, to the fact that the proposed rule on administrative appeals in rail proceedings precludes an appeal when an appellate division reverses, changes, or modifies a prior decision. In addition, another party notes that in nonrail proceedings an appeal to the same division or to the Commission, when such appellate division reverses, changes, or modifies the prior decision, is permitted. Shippers urge that such disparate treatment is unjust and recommended reconsideration of the proposed rules.

One party requests clarification of the proposed rule regarding administrative appeals in rail proceedings to indicate whether appeals may be filed from decisions of joint or employee boards.

The response of practitioners suggests adding another exception to the rule that no further administrative appeal shall lie in rail proceedings. Such exception would read: "unless the decision, order or requirement is issued by the division or Commission in the first instance."

One practitioner criticizes the proposed rules relating to administrative appeals as inconsistent with the intent of the 4R Act. He claims that the 4R Act was misconstrued when drafting the proposed rules. He states that the rules are inconsistent with the provisions of the 4R Act insofar as they make the initial decision of a division a final decision and isolate a decision from meaningful review within the agency.

IX. *Counsel at oral argument*

Comments to the proposed rule limiting to one the number of counsel at oral argument for each side are generally unfavorable. One party proposes revision of the rule to provide all active litigants with an opportunity to be heard. Another complains that the proposed rule violates due process by forcing parties on the same side, who may have diverse and even conflicting interests, to be represented by one counsel. That party also alleges that this rule contradicts the spirit of the proposed rules on intervention, which recognize the distinctive, selective, and often contradictory interests which partes on one side of a case may possess.

The comment of several attorneys expresses the views that the proponent should be allowed to reserve some of the allotted time for rebuttal argument and that more than one counsel should be permitted if there are multiple parties on that side. They suggest, however, that all parties on one side could be required not to exceed a set amount of time allotted to it collectively.

X. *Compliance with the Rail Revitalization and Regulatory Reform Act of 1976*

The comment of one Government agency recommends revision of the proposed rules to comply with the 4R Act. They point out that section 305(a) of that act requires the rules to specify time limits for the disposition of all pleadings by the Commission, to provide for the use of Administrative Law Judges and employees of the Rail Services Planning Office in complex adjudicatory or rulemaking proceedings, and to provide specific remedies in any case of failure to observe required time limits. In none of these respects, the Government agency asserts, do the proposed rules comply with the specified requirements.

PROCEDURAL MATTERS

Among the 38 pleadings received, two parties request oral argument. Brown Transport, Inc., in its pleading filed January 7, 1977, requests that rule 13 be amended to clearly indicate that employee representatives can appear before the Commission as both representatives and witnesses, or, alternatively, that oral argument be ordered regarding this one issue. Joseph G. Dail, Jr., in his pleading filed January 7, 1977, states his opposition to the page limitation on exceptions in rule 101(b)(3) and requests that oral argument be ordered regarding this one issue.

All interested parties have been permitted to submit all their evidence in writing. A substantial number of parties address the issues of concern to Brown and Dail. While we agree that the opportunity to participate in proceedings such as this should be as widespread as possible, we think we have amply afforded such opportunity herein. To set the above-mentioned matters for oral argument would deprive the public of the benefits of the revised rules for a considerable period of time. It should be remembered that rulemaking is a quasi-legislative process and that interested parties can seek further improvements in the rules as the need therefor becomes evident. The requests are denied.

The Transportation Association of America asks that these rules be further modified so as to incorporate time limitations applicable to those parts of the regulatory process under the Commission's control. Alternatively, it requests that if its recommendation is regarded as unduly broadening of this proceeding, its statement be considered as a formal request to open a new rulemaking proceeding to consider such changes. Some time limitations have been adopted herein. However, the matter of time limitations in motor carrier cases already has been the subject of a request for a rulemaking proceeding by The American Trucking Associations, Inc., which is currently docketed under Ex Parte No. 55 (Sub-No. 21).

The Motor Carrier Lawyers' Association (MCLA) asks the Commission to institute a task force consisting of Commission personnel and members of the Commission's bar to meet on a regular basis for the purposes of analyzing the problems of the Commission's workload both internally and externally, and of devising reasonable, effective, and practical solutions. This Commission recognizes that a dialogue between its personnel and parties practicing before it could be of great value. The potential range of perspective and expertise which could be applied would be highly beneficial. Therefore, this Commission invites the MCLA to submit a concrete, specific proposal which reflects compliance with any applicable Federal law.

Discussion and Conclusions

For purposes of discussion, the material will be divided into the following categories: (1) Rules on which no specific comments have been received; (2) Rules requiring minor modifications or clarifying comments; (3) Computation methods and page and time limitations; (4) Employee representatives and dual capacity; (5) Protests against applications and against revisions to rail rates and charges; (6) Discovery procedures; (7) Bench decisions; (8) Intervention; (9) Oral argument in lieu of briefs; (10) Administrative appeals; (11) Number of counsel per side at oral argument; (12) Compliance with the Railroad Revitalization and Regulatory Reform Act of 1976; and

(13) Other comments. Since these categories are, by necessity, somewhat arbitrary, a particular rule make sometimes be discussed more than once. For example, a rule imposing time limitations may also require minor clarification as to the meaning of terms used therein.

(1) *Rules about which no specific comments have been received.*—The comments received from interested members of the public do not specifically address rules 1, 2, 6, 8, 11, 14, 18, 24-26, 28-33, 35-39, 41, 43, 47, 52-54, 56, 59, 61, 64-67, 69, 74-86, 89, 90, 93, 94-96, 97, 99, 100, 104, 245, 246, 248, 249, and 251 and appendixes B, E, F, and G. These rules and appendixes result from the efforts of two internal Commission committees which have relied on the expertise of all pertinent Offices and Bureaus within the Commission. We believe that the lack of comment is silent testimony to the practicability and clarity of these rules and appendixes. Therefore, they will be adopted herein.

(2) *Rules requiring minor modification or clarification.*—Rule 3 is the mechanism by which parties can receive instructions to supplement these rules in special instances. The Department of the Army requests inclusion in rule 3 of the name, title, and telephone number of a knowledgeable Commission official able to answer questions concerning the Rules of Practice. We feel that this request has considerable merit. Therefore, the rules is amended to permit telephone inquiries addressed to the Secretary and Assistant Secretary of the Commission. The telephone number and names of the persons presently holding these positions will not be placed in the text of the rule. To do so would create the need to revise this rule each time a new person assumes one of these positions or each time a phone number is changed. The current telephone number of the Office of the Secretary of the Commission is (202) 275-7428. Interested parties should be aware that this procedure is being provided as an accommodation and that informal opinions so provided will not be legally binding on the Commission.

Rule 4(d) provides that this Commission may order any redudant, immaterial, impertinent, or scandalous matter stricken from any pleading, document, or paper filed with it. Babcock, Paschall, and Paylor would like this Commission to add irrelevant or frivolous material, material violative of the rules of evidence and new matter on reply or on exceptions to that matter which may order stricken. We agree that irrelevant matter should be added. It has a distinct legal meaning separate from immaterial and such matter should not properly be considered. The other suggested additions will not be made. Frivolous matter would appear either immaterial or irrelevant. The scope of this rule goes beyond communications intended as evidence, therefore, statements violative of the rules of evidence may be proper in other types of communications. As to new matter, this problem is adequately covered by rules 49 and 101.

The Association of American Railroads (AAR) feels that rule 5(e) should include in the definition of "pleading," "written comments," and "petitions to investigate," which terms replace protests under the new rail abandonment and proposed merger procedures. We agree. Also with respect to rule 5, Champion International Corporation states its objection to the removal of supporting shippers or witnesses at oral hearings from the definition of a "party" in rule 5(d). In fact, the old rules did not define party. Supporting shippers and witnesses are not parties to proceedings before the Commission even though such proceedings have an effect on them, because their legal interests are not being litigated. Champion's concern is that it will be excluded from service of pleadings in matters concerning proceedings it supports. If it wishes to become a party and submit pleadings of its own, a shipper can request leave to intervene. If it merely wishes to receive a copy of the Commission's decision, it can be placed on the service list, at its request in specific proceedings.

Rule 7 requires the registration of all practitioners before the Commission. Richard Lee seeks to insure that "rate auditing" firms do not represent clients before the Commission for a fee unless the work is done by a practitioner. The proposed rule will not be changed. As it presently stands, the rule requires that anyone representing a client before the Commission must be registered. If this practitioner is asking that the Commission now certify and regulate rate auditing firms, his request must be denied. Such a procedure is not deemed necessary because the Commission is not aware of abusive or unjust practices arising from the use of rate auditing firms and because the Commission does not wish to undertake the substantial policing functions that such a procedure would require.

Thomas F. McGrath feels that the increase in the charge for the practitioner's application in rule 9(d) is oppressive and may be detrimental to otherwise qualified individuals desiring to practice before this Commission. We do not agree. The increased fee is not prohibitive and is, in fact, a rather modest charge especially in light of the cost of bar applications for attorneys at law practicing before the Commission.

The State Corporation Commission-State of New Mexico (S.C.C.) would like rule 9 amended to require that all practitioner-applicants have a Bachelor's Degree in any of the various business disciplines. Such a rule would penalize many capable individuals who have acquired their knowledge of transportation law through years of practical experience in the industry. It is felt that at the present time, the practitioner's examination is sufficient to insure the competence of prospective practitioners.

As to rule 15, Grain Processing Corporation (GPC) and Babcock, Paschall, and Paylor object to the printing requirement for pleadings in excess of 50 pages. They argue that such a rule fails to recognize technological advances in reproduction methods and results in delay and expense in the preparation of briefs. Babcock, Paschall, and Paylor suggest that the rule merely require that the reproduction be made on both sides of the page. We feel that these proposals have merit and, accordingly, the printing requirement will not be imposed, but the requirement of reproduction on both sides of a page will be retained.

It is also recommended that the number of copies of pleadings, documents, or papers required to be filed with the Commission under rule 16 be further reduced to five. The proposed rule reduces the requirement from eight to six copies. It is our opinion that six is the minimum number of copies necessary for the processing of such papers and we will not at this time further reduce this requirement. Gordon P. MacDougall is concerned that the proposed reduction from eight to six copies will prevent certain parties who should have access to the documents from ever seeing them. We have considered this, and we determine that the reduction will only eliminate unused, excess copies.

GPC seeks to amend rule 17 to provide that any pleading, document, or paper signed by a practitioner need not be verified or accompanied by an affidavit. The rule presently requires verification respecting applications, modified procedure, and statements of claimed damages. We believe that verification of alleged facts is essential in many matters before the Commission. On the other hand, proposed rule 17 states that with the exception of rules 38, 50, and 100, a practitioner's signature may be used in lieu of verification. Such statement, however, is not accurate. Rule 57 requires a verified petition for discovery and proposed rule 42(g) requires a verified complaint where there is a protest against revisions to rail rates and charges. In order to correct this patent contradiction, the last sentence of rule 17 will be amended to read:

"A pleading, document, paper thus signed need not be verified or accompanied by affidavit except as otherwise provided in these rules."

Certain attorneys request that rule 19 be amended to prohibit the acceptance into evidence of recitals of material and relevant facts unless they are separately stated and verified. They correctly argue that pleadings often contain mixtures of allegations of disputed facts and arguments. We accept their proposal which we feel will more fairly apprise opposing parties of facts sought to be entered into evidence.

The Office of Consumer Affairs (OCA) asks for guidelines as to when leave to file amendments under rule 20 will be granted. We believe that hard and fast guidelines would not be appropriate in this rule because of the large variety of circumstances, both foreseeable and unforeseeable, which might equitably require us to grant leave to amend.

Rule 23 concerns replies. The Department of the Army correctly states that this rule should be cross-referenced to rules 102 and 103, since rule 23 governs the time for filing replies under rules 102 and 103. The failure to do so was an oversight in the preparation of the proposed rules. Certain attorneys query whether this rule is clear that a reply to a reply is permissible under some circumstances such as under rule 51. A reply to a reply is never permissible without specific authorization from the Commission. Rule 51 deals with the filing of pleadings under modified procedure and provides for the filing of an initial statement by the complainant, an initial statement by the defendant, and a reply statement by the complainant. It appears that these attorneys mistakenly view defendant's initial statement as a reply. In fact, only complainant is permitted a reply under this rule and no reply to complainant's reply is permitted.

Our own review indicates that rule 23 should be expanded to include procedures regarding motions. While the rules have heretofore overlooked this area, it is felt that motions should be treated in approximately the same manner as replies. Additional minor editorial changes have been made to preclude the possibility of confusion.

GPC asks that rule 27(d) be amended to delete the adjective "unabbreviated" from "unabbreviated names." It does not state its reason for requesting this change which will not be made because we seek to make it clear that the full names of all parties, complainant and defendant, must be stated correctly in formal complaints.

Babcock, Paschall, and Paylor ask whether rule 34 should provide that service will be made personally upon the carrier's designated agent and will be made by other means, such as personally upon any other person or by mail, only if no such agent has been designated. Proposed rule 34 permits, with a limited exception, service on the party as well as on the agent, either personally or by mail. This method assures notice to the proper parties in an expeditious and efficient manner and will not be altered.

OCA asks that as to rule 44, the Commission establish guidelines to aid the public in filing petitions for rulemaking. It is concerned that such petitions are treated as letters of complaint. The Commission intends to keep the rulemaking procedures as flexible as possible. In order for a filing to be treated as a petition under rule 44, the party seeking the institution of a rulemaking proceeding need only clearly indicate such intent and the subject matter of the proposed rulemaking proceeding. That this is the minimum amount of information required is self-evident from a reading of the rule.

As to rule 45, Federal Highway Administration (FHWA) wants a clear statement in the rule that an applicant is the complainant in safety fitness proceedings and further seeks delineation of the circumstances under which an applicant would be considered a defendant. In licensing proceedings, the applicant has the burden of proving that it is fit; financially, and otherwise to perform the proposed service. This affirmative obligation rests on the applicant-complainant. We believe, however, that it would be counterproductive and unnecessary to list specifically whether a party is a complainant or a defendant in each type of proceeding that comes before us. The rule presents a clear standard by which a party in any proceeding can determine whether it is a complainant or defendant.

Rule 46(b) provides that if a party fails to timely file a pleading required on modified procedure it will be deemed to be in default and to have waived any further hearing. The proceeding may then be disposed of without further notice to the defaulting party and without other formal proceedings to such party. Other parties argue that a party ought to be able to waive the filing of a reply without being deemed in default and that even a party in default should be entitled to notice of the disposition of a proceeding, especially if the disposition requires action or compliance by the defaulting party. Since a reply (rebuttal) is a permissive pleading (see rule 23) rather than a required one, failure to file does not result in default. As to the notice matter, it is a common occurrence in motor carrier applications for a carrier to file a protest and then upon closer inspection determine that it does not have substantial interest in the matter. Such a carrier then often does not file either its initial statement or a notice of withdrawal. This rule terminates the Commission's responsibility to consider the interest of such parties in this type of situation and permits us to continue processing the involved proceeding. Under existing and proposed procedures, the defaulting party remains on the service list to receive all Commission releases in the matter; however, other parties are not required to serve copies of their pleadings on such defaulting party. We see no reason why a defaulting party should be accorded any greater rights.

These attorneys also suggest that rule 48 be modified to require parties having common interests to file joint pleadings only to the extent practicable. We agree with this suggestion which we feel more accurately states what is required and, in fact, done in practice.

As to rule 49(a), the Department of the Army asks that this rule prohibit the use of case precedent and legal argument in statements of fact and the use of facts in legal argument that are not contained in the accompanying verified statement of facts. The rule as proposed already prohibits the use of precedent and argument in statements of fact by requiring that argument and fact be separately stated. We agree that the rule should be changed to clearly indicate that only facts contained in the verified statement of facts can be used in argument. It is requested that this rule be amended to state that specific detailed admissions or denials, separately stated, are no required in a defendant's pleading, but that defendant's pleading must contain a statement of fact and argument which is well-organized and directed at the issues and material allegations. We will not adopt this suggestion because the requirement of the proposed rule (which requires the defendant to specify statements of fact and arguments of the opposite party to which exception is taken, and include a statement of the facts and arguments in support of such exception) present a clear standard which focuses on the pertinent issues at hand. The amended proposal profferred by these attorneys is much more vague and susceptible to a variety of interpretations.

FHWA asks that rule 51 be amended either to limit reply evidence to questions raised by defendant's evidence, or, in the alternative, to allow defendant to submit a reply. Reply evidence is already limited as explained in our above discussion of rule 49(a).

Some parties want to delete from rule 55(b) the requirement that a party seeking a written transcript of an electronically recorded proceeding must furnish, to the Commission, at no expense to the Commission, an original and one copy of such written transcript. Such a requirement is necessary for the Commission to further process a proceeding and the expense is properly one incurred in the prosecution of a party's case.

AAR correctly states that the reference in rule 58(b) to rule 59(c) should be stricken because rule 59(c) is deleted from the proposed rules. This will be done.

It is believed that rule 68 should permit parties to move for a prehearing conference. There is nothing in the proposed rule which will prohibit the Commission or a hearing officer from entertaining such a motion. In fact, motions for a prehearing conference are a common occurrence. However, to clarify the situation, we will specifically indicate in the rule that parties may request a prehearing conference. AAR suggests that replacing the words "either or both parties" with "any and all parties" would clarify rule 68(a)(3). We agree with AAR and will, therefore, change the wording to "any or all parties."

National Industrial Traffic League (NITL) feels that rule 87 is ambiguous because its title indicates it refers to objections to evidence while the text indicates it refers to rulings of an officer at a hearing. We agree that clarification is required, and accordingly, the title changed to "Ruling of an officer at a hearing; objection to."

Certain attorneys seek clarification of rule 91(d) as to whether an abstract of evidence may be contained in an appendix or other document separate from a brief. Confusion seems to arise from the removal of the sentence requiring the abstract of evidence to be placed between the statement of the case and the argument. No change in format is intended by this revision which is made in order to be consistent with the change from mandatory to permissive inclusion of abstracts of evidence.

AAR asks that rule 105 define the items which are adopted from the Railroad Revitalization and Regulatory Reform Act of 1976 and which start the running of prescribed time limits. This is not necessary because such events are defined in the act itself.

Rule 200 governs the procedure employed in certain suspension and fourth-section matters. NITL states its agreement with the rule, but urges that it not be construed as prohibiting a party from including in such an appeal commentaries on or summaries of matter already submitted to the Suspension and Fourth Section

Board. The rule does not prohibit such comments or summaries. The Department of the Army protests the removal of the unusual circumstances exception to the prohibition against new information in petitions for reconsideration. It is concerned that a carrier may provide information in its rebuttal to protestant's statement which would then be immune from attack on petition. Respondent should be aware that new evidence in a rebuttal statement is the proper subject of a motion to strike. However, the unusual circumstances exception will be retained in order to fully protect the interests of protestants.

Midwest Packers Traffic Association (MPTA) requests that an additional subsection be added to rule 247 which would provide that shipper support statements will be considered prima facie true and correct. We do not feel that such a subsection is appropriate. If a shipper support statement is properly verified it is given the weight accorded to all other verified documents before this Commission. We do not believe it appropriate to decree that the statement of one party will be given greater weight than that of another party.

AAR asks that the prohibition against ex parte communications contained in appendix C not be extended to rulemaking proceedings. As the comments in the Federal Register publication of November 8, 1976, indicate, rulemaking proceedings, to the extent permissible by law, are not subject to this prohibition. We are of the firm opinion, however, that ex parte communication during a rulemaking is just as improper as it is during any other proceeding. The Commission's decisions should be influenced only by statements that are a matter of public record. AAR's suggestion is, therefore, rejected.

(3) *Computation methods and page and time limitations.*

(a) *Time limitations.*—Proposed rule 4(b) provides that the date of receipt at the Commission and not the date of deposit in the mails of pleadings, requests, or other papers or documents, is determinative. The date of receipt was originally selected in the belief that it affords the greatest degree of certainty and additionally serves to most effectively reduce regulatory delay within the Commission.

We appreciate the problems encountered by non-District of Columbia attorneys and practitioners under this rule. However, we feel that their suggested modifications of the rule, while intended to alleviate their inherent disadvantage, fail to meet the abovementioned criteria. For example, if pleadings were automatically deemed filed on the date of mailing, uncertainty could result in the event the postmark was either missing or illegible. In such event, oral testimony or written affidavits attesting to the date of mailing would be required, thus further contributing to administrative delay. Moreover, requiring that all documents be sent by certified or registered mail in order to prove date of mailing and to circumvent the potential problem of a missing or illegible postmark, would be unacceptable. Such requirement would impose an undue burden on attorneys and practitioners in terms of their time and resources. For those very reasons we are also persuaded to reject the proposal that all parties be required to mail all pleadings to the Commission at least 2 days prior to the due date.

On the other hand, the vicissitudes of the mail service warrant some modification of the rule. Nevertheless, proposals to allow an additional 3- or 5-day period when service is by mail are unacceptable since this would merely extend the time limitations on filing by some arbitrary number of days and would only serve to add to the already troublesome problem of administrative delay. Nor would allowing parties to file documents at Commission field offices be a reasonable alternative. Such procedure would merely increase regulatory lag by adding to the normal processing time of a pleading, an additional period of time necessary for forwarding pleadings from the field offices to the Commission. We, however, conclude that an acceptable modification of the rule would be in the form of a proviso to the effect that documents mailed by certified or registered mail postmarked at least 3 days prior to the due date will be deemed accepted as timely filed. Accordingly, the rule will be revised to reflect such change.

Of the comments objecting to specific time limitations imposed by the proposed rules, one related to the discovery rules, which will be discussed at a later point. Another contained a recommendation that, assuming bench decisions are permitted, nonrail administrative appeals should be allowed to be filed 30 days after the transcript becomes available rather than 30 days after the date of service of the decision, order, or requirement. We believe that the proposed rule is adequate. While we recognize that transcripts ordinarily are not available for a period of time after the close of the hearing, normally there is also a lapse of time between the close of the hearing and the service of the decision, order, or requirement. Therefore, the period for filing nonrail administrative appeals where bench decisions are issued, is not as restrictive as contended. We feel that the proposed rule is superior to the recommendation in that the occurrence of the designated event from which the time period begins to run is more readily ascertainable and at the same time provides a time frame which is reasonable and fair.

We further determine that the request that the 20-day limitation on filing rail administrative appeals be replaced with the original 30-day limitation is unacceptable. The rule was changed to contain the 20-day limitation so that it would comport with section 303(a) of the 4R Act. Accordingly, no further amendment of that rule is contemplated.

(b) *Time computation.*—There is merit to the suggestions that the proposed rule on time computation (rule 21) be amended (1) to clarify on what date a pleading should be filed when a party is directed to file a pleading on a day which happens to be a Saturday, Sunday, or legal holiday, (2) to cover situations where time is measured backwards from a certain date, and (3) to reincorporate the deleted provision permitting requests for postponement of filing briefs or other documents within a period less than 10 days prior to the due date in a situation involving extraordinary circumstances. This rule will, therefore, be amended to reflect such changes. It is sufficient that we promulgate our intention to acknowledge requests for postponement of filing documents within less than 10 days of the due date under extraordinary circumstances. To further broaden the rule by shortening the deadline for filing a request for postponement from 10 to 5 days would only encourage such filings and contribute to administrative delay. Nor do we find any need to clarify the words "other documents" contained in that rule. General language was intentionally used in order to apply to all pleadings, requests, papers, or documents, other than briefs, which are specifically enumerated. Such intent is accurately conveyed by the use of the words "other documents."

(c) *Page limitations.*—Numerous suggestions for revising the page limitations applicable to exceptions and petitions for administrative review, which are set forth in the general comments, need not be specifically refuted here. Generally, the proposed rules are reasonable and proper and the suggestions are without merit. For example, inclusion of a provision for relief from the page limitations upon a showing of extraordinary circumstances would only serve to encourage requests for relief and would, therefore, have a significant delaying effect on case processing. Proposals to eliminate or extend page limitations are also, on the whole, arbitrary and unjustified. One suggestion with which we are in agreement, however, is the extension in matters involving common carriers by rail to 30 pages of the limitation on petitions for administrative review in the case of the first appeal of an initial administrative decision rendered by a division or the entire Commission. All appeals from initial decisions, regardless of the issuing body, ought to be subject to the 30-page limitation since the issues at the initial stage are normally broad and frequently complex. Otherwise, it would be difficult to adequately address all issues raised in the decision.

It was additionally proposed that these rules be modified to permit a maximum of 30 pages when reproduction is by standard typographic printing and a maximum of 50 pages when reproduction is by any other process. We reject this proposal for the reason that the rule regarding typographical specifications, which makes direct reference to reproduction by printing or by any other process, was in effect at the time the page limitations were established. It is, therefore, reasonable to assume that printing, as well as other processes, were considered when establishing page limitations.

(4) *Employee representatives—dual capacity.*—The comments regarding this area seek a clear statement by the Commission that we will permit representatives of parties to appear in the dual capacity of both advocate and witness. Under existing rules 8, 9, and 71, respectively, attorneys, practitioners, and full-time employees may represent clients in proceedings before the Commission. The present Code of Practitioners Before the Interstate Commerce Commission, Canon I, requires that all such representatives conform, as nearly as may be, to the standards of ethical conduct required by practitioners before the courts of the United States. Disciplinary Rules DR 5-101 and DR 5-102 of the American Bar Association Code of Professional Responsibility prevent a lawyer from appearing in a dual capacity for a client unless: (1) the testimony will relate solely to an uncontested matter; (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) the testimony will relate solely to the nature and value of the legal services rendered in the case by the lawyer or his firm to the client; or (4) the refusal to permit dual capacity by the lawyer would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

As a general principle, we feel that the standard of ethical conduct required before the courts of the United States is an excellent standard toward which practitioners before the Commission should strive. On the other hand, we are aware of the fact that small parties of limited means frequently find it necessary to appear *pro se* or by an employee who may or may not be a practitioner. In such circumstances, strict adherence to American Bar Association standards for lawyers could work a substantial hardship on parties.

Since our rules only require adherence to such standards as nearly as may be, we are permitted some latitude in this area. Dual capacity will be permitted in proceedings before the Commission in order to protect the rights of parties to prompt disposition of their cases on a complete record. We feel that such a position, in light of the distinctive nature of administrative proceedings before the Commission, is consistent with the spirit of Disciplinary Rules DR 5-101 and DR 5-102 which place the interest of the client above the restriction against dual capacity.

(5) *Protests against applications and against revisions to rail rates and charges.*—Sea-Land Service Inc. (Sea-Land), asks that we specifically include in rule 40(b) a statement that if the protest time is missed, an appropriately supported petition for leave to intervene must be filed. This statement appears in the comment to the revised rules. We do not feel that such an addition is necessary or desirable. Such a statement might lead parties to believe that protest and intervention are equally acceptable alternative methods of opposing relief sought in a proceeding, where in fact they are not. The failure to timely file a protest will force a party to comply with the requirements of intervention if he is to participate in a proceeding.

We have been asked to clarify what is meant by an appropriately supported petition for leave to intervene. Such a petition is one which comports with the requirements of rule 72. We have also been asked to replace the provision in existing rule 40 which states that a failure to file a protest shall not prejudice subsequent participation in the proceeding. It is our purpose to discourage the parties from failing to file timely protests and to indicate that the requirements for leave to intervene are more restrictive.

AAR asks that we parenthetically note that this rule does not apply to rail abandonments and mergers. The pleading in abandonments may be either a comment or a petition for investigation, while in rail mergers it is a comment, neither of which falls within the definition of a protest as found in rule 5(c). Therefore, rule 40 is not applicable.

With respect to the rule providing for protests against revisions to rail rates and charges, one party suggests that the language be changed to provide that such protest "should" rather than "shall" include a verified complaint. We reject this suggestion for the reason that section 202 of the 4R Act specifically requires a verified complaint under such circumstances. That section also specifies what facts must be shown in the verified complaint. Therefore, the proposal that the verified complaint be limited to a request that the protested mutter be suspended and investigated is also rejected, as in contravention of the 4R Act. Additionally, the language of section 202 conditions the suspension of rail rates and charges on the filing of a verified complaint. We conclude that a formal complaint and request for investigation cannot be substituted for a protest where a party is unable, because of lack of information, to verify that he is likely to prevail on the merits. Because complaints are required to be verified under this rule, we are also requiring replies thereto to be verified.

We agree with the suggestion that rule 42(g) be revised to make reference to the rules on market dominance. It will, accordingly, be revised.

(6) *Discovery procedures.*—While there are some comments in favor of the proposed discovery rules, the majority are unfavorable. Parties feel that the combination of time constraints and required petitions for all forms of discovery will make the use of discovery virtually impossible. Some parties feel the petition requirement is advisable but that the time limits should be loosened. Dissatisfaction is generally expressed by parties who feel that the proposed rules are moving farther away from those employed in the Federal courts. It has been suggested that abuse of discovery has been primarily in the area of applications for motor carrier operating rights authority.

Since the drafting of these rules, discovery procedures have been amended in *Revision of Application Forms,* 125 M.C.C. 790 (1976). That proceeding eliminated the use of discovery, except by petition, in those motor carrier operating authority cases in which the modified procedure is followed. As previously asserted, this has been a major area of abuse of discovery procedures. For this reason, we feel that the petition requirements for interrogatories and requests for admissions can be removed in proceedings other than those arising under rule 247. This is more consistent with the rules employed prior to Ex Parte No. 55 (Sub-No. 14).

We, however, will retain the requirement that the use of discovery must be accomplished in sufficient time for parties to meet established dates for hearing or for the submission of initial statements under the modified procedure. The loosening of the petition requirements will make it easier for parties to use some discovery methods. These rules are intended to follow Federal court procedure to the extent possible in light of this Commission's mission and peculiar circumstances. Strict time periods are necessary in order to combat administrative lag and to insure compliance with legislatively imposed deadlines.

AAR has requested the inclusion of a schedule for the handling of discovery petitions. In order to permit a fuller use of discovery, no specific time limitation has been instituted for the filing of petitions. Accordingly, no workable schedule is practical because it is impossible to determine how much time this Commission may be able to devote to the disposition of such petition without knowing the time frame between date of filing of the petition and the date set for hearing or filing of initial statements under modified procedure.

Certain attorneys feel that the scope of the examination on deposition should be limited to the subject matter specified in the order to take a deposition. We agree. Exceeding the scope of the order will be proper ground for objection. They also ask that officers be allowed to personally serve depositions on the Commission and that the confidentiality of material contained therein be protected. Because of the variety of persons who may qualify as an officer for the purpose of taking depositions, it is felt that less confusion will inure by having one single method for service which can be used by any officer no matter where he may be located. As to the confidentiality of the matter in the deposition, it is necessary that records in administrative proceedings be available for public inspection. The procedures for certification and service of depositions protect deponents from errors in transmission and identification (see rule 60).

Babcock, Paschall, and Paylor ask that the rules require the service of interrogatories at least 20 days before the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure. The proposed rules anticipated that the orders disposing of the petitions for interrogatories and requests for admissions would set the time for the serving of these discovery methods. Since petitons are no longer necessary for interrogatories and requests for admissions in many types of proceedings, time limits for service of the same must be reinstituted. The old rules provided that service had to be made 10 days prior to hearing or the filing of statements. That time limit presented problems because the answering party was permitted 15 days after service to respond. Therefore, an appropriate modification has been inserted in rules 62(c) and 63(c) which effectively eliminates this problem.

Rule 62(b) allows a party to respond to written interrogatories by making available records kept on computer runs, punchcards, or tapes to an uninterested party for the extraction of information sought where such records also contain privileged or proprietary information or information the disclosure of which is proscribed by the act. Babcock, Paschall, and Paylor ask that this procedure be extended to all forms of business records. The reason for this alternative to the specific answering of the interrogatory or the production of business records is the difficulty in separating material and the time and expense involved in abstracting material from computer runs, punchcards, or tapes. Other business records are not subject to the same infirmities and, therefore, the exception will not be extended.

(7) *Bench decisions.*—The proposed rule prescribing the authority of officers contains a provision permitting the issuance of bench decisions. Such provision was included in order to facilitate fast decisionmaking in routine types of cases. It was not contemplated that the provision for bench decisions would be used in unopposed proceedings or in proceedings involving complex factual or legal issues. Regardless, inclusion of suggested language prohibiting use of bench decisions in proceedings involving complex issues of fact or law would be a futile act, since the officer who decides whether to issue a bench decision would inevitably be the same individual charged with the responsibility of determining which proceedings involve complex factual or legal issues.

However, a recommendation that the authority of officers be broadened to include authority to decide motions involving final determination of the merits of the proceeding will be adopted. Such authority presently lies with the Commission, division, or division Chairman. It is felt that this procedure is unnecessarily cumbersome. By vesting hearing officers with this power, decisions can be made more expeditiously.

One party argued that motor carrier operating rights cases so simple as to permit bench decisions to become the norm should instead be assigned for modified procedure. There is no logic to this reasoning since in order for the officer to be able to conclude that a bench decision is necessary, he must first be afforded the opportunity to examine the witnesses and explore the issues. This is done only after a determination that the proceeding is more suitable to handling by oral hearing than by modified procedure. The fact that a decision is clearly warranted after oral hearing does not demonstrate that the involved cases could have been more efficiently handled under modified procedure. For example, a case with 20 protestants is more conducive to oral hearing, even though it may result in a bench decision.

Another party claimed an inconsistency between the proposed rule regarding bench decisions and the rule permitting oral argument in lieu of written briefs. While the former rule permits the officer to issue a bench decision "after the filing of briefs," the latter rule permits, under certain circumstances, the elimination of briefs. As we did not intend to preclude bench decisions for applying to those cases in which oral argument is substituted for written briefs, we will accordingly amend the rule.

The only other change necessary in rule 70 is the deletion of the sentence which specifies when the jurisdiction of hearing officer terminates. In light of the revision of the proposed rule adopted herein and in light of the objectives of this proceeding, we determine that this provision is no longer necessary.

(8) *Intervention.*—OCA asks that we set specific guidelines for the granting of petitions for leave to intervene and suggests that such leave be granted only where the petitioner's interests are not adequately represented and that interests of interveners be consolidated when possible. We feel that the present limitations on intervention are adequate and provide this Commission with the necessary flexibility to resolve petitions in light of the varying circumstances in each case.

A number of parties have commented on rule 73 regarding participation without intervention. AAR and OCA both point out that if this rule is to apply to abandonments it should refer to section 1(a) of the Interstate Commerce Act rather than section 1(18) and AAR feels that such participation is inconsistent with section 1(a) of the act. We agree that the reference should be corrected as indicated, but we disagree with AAR's contention in that section 1(a) is intended to encourage small interested parties to participate in abandonment proceedings. Such participation is essential if abandonment proceedings are to be resolved fairly.

National Small Shipment Traffic Conference (NSSTC) and Drug and Toilet Preparation Traffic Conference (DTPTC) ask that this rule be extended to permit participation without intervention in rate investigation proceedings on modified procedure. Such participation has been permitted in the past and we agree that it should be retained. This procedure is particularly useful in investigation proceedings and does not appear to be unduly burdensome.

(9) *Oral arguments in lieu of briefs.*—While the proposed rule granting the hearing officer discretion to permit oral arguments in lieu of briefs was generally well received, several parties recommended that the rule require notice to the parties at the opening of the hearing if oral argument is to replace briefs. The proposed rule requires "reasonable notice" to the parties and we believe that this is sufficient. The hearing officer may, at any point in the proceeding, determine the need to substitute oral argument for briefs. Therefore, modification of the rule to require notification to the parties at some specific point would be counterproductive. "Reasonable notice" is, moreover, an accepted and frequently used standard and its inclusion in the rule is appropriate under the circumstances.

Nor can we accept either suggestion of the parties that the hearing officers be required to first consult with the participating parties or that they be prevented from subsituting oral arguments for briefs unless all litigants concur. To require either of these modifications would in effect vitiate the discretion of the hearing officer and would, for that reason, be unacceptable.

The proposal that the rule be amended to include a prohibition against its use in proceedings involving complex issues of fact or law or in unopposed proceedings is also pointless. Since any determination as to the complexity of any proceeding would be within the discretion of the hearing officer, such modification would appear to be gratuitous.

With regard to this subject as well as the issuance of bench decisions, we are confident that our Administrative Law Judges will use these powers wisely. They have broad discretion in the conduct of the hearing and can be expected to exercise that authority prudently.

(10) *Administrative appeals.*—The comments received in regard to the rules concerning administrative appeals indicate that such rules require further revision. We think an explanation of current appellate procedure within the Commission would be appropriate. Initial decisions by individual Commissioners, Administrative Law Judges, and joint boards become administratively final absent the filing of an appeal or stay by the Commission on its own motion. On the other hand, a report by an employee board, a division, or the Commission is final at the time it is issued but is subject to administrative appeal through the use of petitions for reconsideration.

In those instances where the first decision in a proceeding is issued by the entire Commission, the decision is final but an administrative appeal (petition for reconsideration) is permitted. However, the filing of such a petition does not automatically stay the decision or interfere with its administrative finality. In other words, an appeal can be taken both within the Commission and to the court at the same time. See Ex Parte No. MC-37 (Sub-No. 26), *Commercial Zones and Terminal Areas*, 128 M.C.C. 422 (1976).

These different procedures for initial decisions of various officers were established by section 17 of the Interstate Commerce Act and still apply to nonrail proceedings. Rule 95(b) delineates these distinctions. However, proposed rules 101-103 may be misleading because section 303 of the 4R Act largely voids these distinctions as to rail proceedings. Rule 95(b) as adopted herein has been further revised to eliminate its misleading aspects.

Proposed rules 101, 102, and 103 set forth procedures for administrative appeals in, respectively, all proceedings, nonrail proceedings, and rail proceedings. In the rules as adopted, rule 101 responds to the comments questioning whether rule 102 or 103 applies in a proceeding concerning both rail and nonrail matters. Rule 101 now indicates that rule 103 applies in proceedings where a significant rail matter is involved, regardless of whether nonrail matters are also involved. Such an interpretation is necessary because the revision of procedures in any matter involving a common carrier by rail is mandated by the 4R Act.

Rule 102 as adopted encompasses matters contained in both proposed rules 101 and 102. We feel that the proposed rules consituted a significant improvement over the present procedures in nonrail matters. It is intended that rule 102 as adopted will consolidate all the procedures regarding nonrail matters in one rule without any noteworthy change from the improvements in proposed rules 101 and 102.

The major revisions of the rules as proposed are in the area of administrative appeals in rail proceedings. The adopted rules closely follow procedures set forth in the 4R Act. Section 303 of the 4R Act (which amends section 17 of the Interstate Commerce Act) provides for an appeal of all first decisions not made by the entire Commission but permits the division or Commission to void the requirement for an initial decision under limited circumstances. It sets time limits for effective dates of initial decisions, and for division and Commission decisions, orders, and requirements. Also, it permits petitions for rehearing, reargument, or other reconsideration based on a matter of general transportation importance or new evidence or changed circumstances which would materially affect the prior decision, order, or requirement.

It is expected that many first decisions of bodies other than the entire Commission will be subject to a full appeal. In some instances, however, the requirement of an initial decision will be voided and the first decision which shall be made by the division or entire Commission will be a final decision. The Commission or division must specifically vote to void the need for an initial decision, and, once it does, no administrative appeal other than a petition for administrative review or for stay will be available. Such a decision can be appealed in the Federal courts. Decisions, orders, or requirements disposing of appeals from initial decisions will be treated in the same manner.

Rule 103(a) now sets forth the power of the Commission to void the necessity for an initial, appealable decision under certain circumstances, including situations where the due and timely execution of the Commission's functions so requires. Section 303 of the 4R Act provides 180 days for the taking of evidence, 120 days thereafter for an initial decision, report, or order, then 20 days for the filing of an appeal, and then 180 days from the filing of the appeal for the disposition thereof. Some proceedings are required to be resolved in a much shorter time frame. For example, a final decision in a rate investigation and suspension proceeding must be rendered within 7 months after the rate was scheduled to become effective. Therefore, when a rate investigation and suspension proceeding is sufficiently complicated to prevent a quick initial decision, the due and timely execution of the Commission's function would necessitate the voiding of the initial decision requirement. In such circumstances, the first decision would be a final one and not subject to the procedures for appeal of rule 103(b). It is expected that this is the type of situation where rule 103(a) powers will be invoked.

As indicated in the representations, there is a substantial amount of opposition to the failure of these rules to provide for an administrative appeal to a division decision in proceedings where such decision is the first one issued. Parties have termed this lack of appeal as "unjust," "unwarranted," and "unreasonable."

Rule 103(b) as adopted provides for a complete appeal of first decisions to the fullest extent possible in light of the provisions of the 4R Act. Rule 103(d) prohibits second administrative appeals except for petitions for administrative review or stay. Rule 103(e) sets forth the limited grounds upon which a petition for administrative review can be based. Any decision, order, or requirement of the division or Commission can be the subject of such petition. However, it should be noted that the filing of the petition does not stay the effect of the prior decision which will become administratively final and appealable to the Federal court.

Rule 103(f) indicates when decisions, orders, or requirements become administratively final and when they are stayed. Rule 103(g) indicates the requirements for the filing of a petition for stay. Rule 103(c) sets forth the time for filing appeals.

Certain questions raised in the comments of parties remain, but will be rephrased to conform to changes made in the rules as adopted. One party questioned whether exceptions in rule 102 and appeals in rule 103 can be based on findings of fact or law not made below. This is a reasonable inference of the rules and they will be so construed.

Another party is unsure of the length of the stay of decision provided in rule 102(i) when an administrative appeal is filed. The stay may be as long as 30 days after the date of service of the order resolving the appeal.

Two comments request that rules 102 and 103 be amended to permit a reply to a petition for a stay whenever any party would be adversely affected by the stay. The prohibitions were added to discourage replies and thus reduce the time for the processing of cases. Additionally, such petitions are for procedural relief. Setting a procedure which permits replies would be difficult because of time constraints and would encourage *pro forma* pleadings. In those rare instances where substantial rights of a party will be impaired by a stay, such party may seek a waiver of the pertinent rule. In such instances the request for waiver should be accompanied by a tendered reply.

Another party states his belief that there should be no difference in the way rail and nonrail appeals are treated. Such a view fails to appreciate the specific time constraints and procedural requirements imposed by the 4R Act on the disposition of rail matters. After an opportunity to study the effects of these time limits and procedures, the Commission may, in the future, feel similar treatment of nonrail cases would be appropriate. At such time, it would be appropriate to consider having similar rules for both rail and nonrail proceedings.

(11) *Counsel at oral argument.*—A number of parties express their disfavor concerning the limitation of one counsel for each side to present oral argument. They feel this does not adequately protect diverse interests on one side of a proceeding. It has been the experience of this Commission that substantially diverse interests on one side of a proceeding are the exception rather than the rule, and that the arguments of multiple counsel are repetitious. It is anticipated that the rule as proposed will benefit both the Commission and the public since it will permit the agency to schedule a number of arguments for a single session as well as afford the public greater personal access to the Commission in its proceedings. In any event, the comments overlook the fact that the rule permits the authorization of additional presentation and time. When parties on one side feel that their interests are sufficiently diverse, they may request and be granted separate presentation. We feel that the rule as proposed adequately protects parties in extraordinary circumstances and, at the same time, sets forth an advantageous general procedure.

(12) *Compliance with the Railroad Revitalization and Regulatory Reform Act of 1976.*—The OCA states that the proposed rules fail to comply with section 305(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 insofar as they fail (1) to set time limits for the disposition of all proceedings, (2) to provide for the use of Administrative Law Judges or employees of the Rail Services Planning Office in complex ajudicatory or rulemaking proceedings, and (3) to provide for specific remedies in any case of failure by the Commission to observe the required time limits. Furthermore, Gordon P. MacDougall, a practitioner, contends that the proposed rules are highly unsatisfactory, should not be adopted, and result from a misapprehension of the 4R Act.

We recognize that revision of the proposed rules is necessary in order to comply with the 4R Act. Accordingly, we shall add a rule which would, with respect to any matter involving a common carrier by railroad, provide for the disposition of any pleading or motion for which there is no specific time limit for disposition. Such rule would require expeditious disposition or, in any event, disposition not later than 60 days after the time permitted for filing the last appropriate pleading (for example, 60 days from the filing date of a reply). Additionally, we are amending rule 44 to provide that in rulemaking proceedings or in complex ajudicatory proceedings, the Commission will utilize additional Administrative Law Judges and employees of the Rail Service Planning Office for the taking of evidence or the receipt of views and comments and may, by order, designate such additional procedures as it deems necessary to insure the expedited resolution of such proceeding. We shall also add a rule to the effect that the Commission may, in its discretion, call upon the Rail Services Planning Office for assistance in evaluation, analysis, fact finding, and planning, particularly with regard to rulemaking proceedings, mergers, and appeals within the Commission in an effort to focus issues and expedite matters before the Commission. Finally, we shall add a rule to provide sanctions for failure to meet prescribed time limits in proceedings with respect to any matter involving a common carrier by railroad. In the absence of a showing of extraordinary circumstances, failure of a party to meet such time limits may result in dismissal of any involved complaint, application, or appeal or the striking of any petition, pleading, or motion. The rule also provides that if this Commission should fail to meet a prescribed time limit for disposition of any matter, it must issue a statement to all parties of record: (1) explaining the reason for its failure, and (2) delineating the steps it intends to make to expedite the matter.

(13) *Miscellaneous comments.*—Several miscellaneous comments which do not specifically relate to any of the proposed rules were also received. One party requests the amendment of 49 CFR 1131.2(d), which relates to special procedures for filing applications for emergency temporary authority and also requests an addition to 49 CFR 1131.2(c), which enumerates those things which must be contained in a supporting statement accompanying an application for temporary authority. As these matters are beyond the scope of this proceeding, they will not be dealt with at this time.

Another party requests the enactment of a rule permitting a registered practitioner who prepares a tariff for a client to sign the transmittal letter accompanying a tariff without being required to have a signed power of attorney. This matter is properly covered by the tariff circular rules and, consequently, is not within the purview of this proceeding.

That same party also suggests revision of the proposed rules and canons of ethics to allow practitioners to advertise the availability of their services. Practitioners, however, are enjoined by the canons of ethics to conform as nearly as possible to the standards of ethical conduct required of practitioners before the courts of the United States. Since the question of the extent to which an attorney may advertise remains unsettled, the request to define the ability of a practitioner to advertise is deemed untimely.

We are aware that the proposed revision does not contain a complete chronological sequence. We plan to renumber the rules in our final report to correct this situation.

FINDINGS

We find that unless revised after coments on this report which are due on or before April 4, 1977, Part 1100 of Chapter X of Title 49 of the Code of Federal Regulations should be revised as set forth in the attached notice; that such rules are just and reasonable, otherwise lawful, and to the extent set forth in this report are consistent with the national transportation policy; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

APPENDIX A

Representations

I. LEGAL REPRESENTATIVES

Harry N. Babcock, James R. Paschall, and John J. Paylor
Butler, Snow, O'Mara, Stevens, and Cannada
J. Raymond Clark
John T. Coon
Joseph G. Dail, Jr.
Harper, Young, and Smith
Heim, Koldin, and Canter
LeBoeuf, Lamb, Leiby, and McRae
Richard J. Lee
Gordon P. MacDougall
MacLeay, Lynch, Bernhard, and Gregg
Thomsa F. McGrath
Robinson, Felts, Starnes, and Nations
Smart and Bartsch
Paul F. Sullivan
James H. Sweeney
White and Southwell

II. ASSOCIATION OF CARRIER LEGAL REPRESENTATIVES

Association of Interstate Commerce Commission Practitioners Motor Carrier Lawyers Association

III. CARRIERS AND CARRIER ASSOCIATIONS

Association of American Railroads
Brown Transport Corp.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Cooper Motor Lines, Inc.
Pilot Freight Carriers, Inc.
Sea-Land Service, Inc.
Southern Motor Carriers Rate Conference, Inc.
Transportation Association of America

IV. GOVERNMENTAL INTERESTS

State of New Mexico, State Corporation Commission
U.S. Department of Defense, Office of the Judge Advocate General, Department of the Army
U.S. Department of Health, Education, and Welfare, Office of Consumer of Affairs
U.S. Department of Transportation, Federal Highway Administration

V. SHIPPING INTERESTS

Board of Trade of Kansas City, Missouri, Inc.
Champion International Corporation
Grain Processing Corporation
National Industrial Traffic League
National Motor Freight Traffic Association, Inc.
National Small Shipment Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference
Midwest Packers Traffic Association

VI. OTHER INTERESTS

Rail Labor Executives' Association, and Brotherhood of Railway and Airline Clerks

APPENDIX B

Comments

1. Office of Consumer Affairs, Department of Health, Education, and Welfare (Office).—The Office states that the proposed rules fail to conform to section 305(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 in that they fail to set time limits for the disposition of proceedings, establish for failure to comply with the revised time limits, and provide for the manner in which Administrative Law Judges and employees of the Rail Services Planning Office will be utilized to speed up the Commission's proceedings. As to rule 20, it wants guidelines as to when the Commission will allow a pleading to be amended. It argues that this will reduce the filing of pleadings which have little chance of success and accordingly, reduce staff time used in disposing of such pleadings. As to rule 40, it suggests too many protests are without legitimate interest and are dilatory in nature. The Office requests that more consideration be given to methods of discouraging the abusive use of protests. It suggests that a possible alternative is to bar a party from filing a protest to an application for any part of the same authority for 1 year. As to rule 44, it suggests

setting up guidelines to insure that the submissions of members of the public who seek to petition the Commission to institute a rulemaking proceeding are treated as such rather than as letters of complaint or suggestion or requests for information. As to rule 72, the Office would like guidelines for the granting of petitions for leave to intervene. It proposes that parties be allowed to intervene in proceedings before the Commission only if their interests are not adequately represented and that the interest of interveners be consolidated when possible. As to rule 73, it states that if the rule is going to be used in regard to abandonments, the rule should state that it pertains to proceedings arising under 49 U.S.C. 1(a). As to rule 92, the Office recommends that the time for filing briefs be reduced from 45 days to 35 days. It argues that parties too often reargue the entire proceeding on paper after oral arguments have been completed.

2. Federal Highway Administration, Department of Transportation (FHWA).—As to rule 45(b), FHWA states it is unclear. It recommends that the rule be changed to make clear that in safety fitness proceedings, the applicant is a complainant and has the burden of proof. Also, it recommends that the circumstances in which an applicant might be a defendant in such proceedings be set out in the rule rather than a comment thereto. As to rule 51, it states that the rule should be amended to either limit reply evidence to questions raised by defendants' evidence, or, in the alternative, to allow defendant to submit a reply. As to rule 57, FHWA objects to the change which would require approval by the Commission before interrogatories or requests for admissions are served. It argues such a procedure will hamper disclosure and result in delays. As to rule 88, it supports the proposed change permitting oral arguments instead of briefs in that it believes such a change will facilitate the expeditious handling of simple cases. As to rule 102(c), FHWA suggests the rule allow 30 days after transcripts become available for the filing of appeals. It feels such amount of time is necessary for proper analysis of the transcript and for preparation of complete argument.

3. Office of the Judge Advocate General, Department of the Army, Department of Defense.—As to rule 3, the Army suggests inclusion of the name, title, and telephone number of a knowledgeable ICC official able to answer questions arising out of the Rules of Practice. As to rule 21, it requests clarification as to whether filing dates which fall on weekends or holidays are moved back to the preceding workday or up to the succeeding workday. As to rule 23(d), the Army suggests this rule should also be cross-referenced to proposed rules 102 and 103. As to rule 42(g), it seeks clarification as to whether a Formal Complaint and Request for Investigation can be used where a protest against tariffs cannot be made because of lack of the information necessary for verification. If it can, clarification is sought as to what time limits for filing exist and as to whether the accounting and burden of proof requirements of 49 U.S.C. 15(8)(e)(s) are imposed. Also, it believes rule 42(g) should be cross-referenced to 49 CFR 1109. As to rule 57(a), the Army suggests that if verified petitions for discovery are necessary, an approved form of such verification should be drafted and added to appendix B. As to rule 49(a), it recommends that this rule prohibit the use of case precedent and legal argument in statements of fact and the use of fact in legal argument that are not contained in the accompanying verified statement of facts. As to rule 73, the Army asserts that according to MC-67691 (Sub-No. 4), *Valley Film Service, Inc., Extension—Air Freight* (not printed), decided March 9, 1971, the *Schaffer* rule does not apply to evidence introduced by intervenors. As to rule 200(b)(3), it suggests that the time for filing a reply to a petition for reconsideration be 20 days after the final date for filing such petitions rather than 20 days from the actual filing of such petitions. It argues that this will make the day for replies more certain

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and will be consistent with rules 23(b), 102(c), and 103(d). As to rule 200(c), the Army protests the removal of the unusual circumstances exception to the prohibition against new information in replies to petitions for reconsideration and suggests a broadening of the exception to permit replies to matters which the carriers should have included in its initial justification of the rates.

4. Railway Labor Executives Association (RLEA) and Brotherhood of Railway and Airline Clerks (BRAC).—As to rule 40, the RLEA and BRAC object to the removal of the phrase "no prejudice" and would like some indication as to what is meant in the Comment by "an appropriately supported petition." As to rule 70(a)(2), they suggest that this rule may be inconsistent with rule 88 in that rule 70(a)(2) indicates a hearing officer may act upon motions submitted to him after the filing of briefs while rule 88 permits elimination of briefs. As to rule 88, the RLEA and BRAC argue that allowing the elimination of briefs in favor of oral arguments at the end of oral hearings discriminates against parties with lesser resources and request that briefs not be eliminated. As to rule 98(d), they object to the time limitation for argument and the requirement of only one counsel arguing for each side. They feel that such provisions violate the "due process" protections of the U.S. Constitution and the Administrative Procedure Act and fail to recognize the often diverse interest of parties on one side of the case. As to rule 103(a), the RLEA and BRAC feel the rule should be clarified to indicate as to whether appeals may be filed from decisions of joint or employee boards.

5. Association of American Railroads (AAR).—As to rule 5(e), AAR suggest the term pleading should encompass "written comments" and "petitions to investigate" which replace protests under the new abandonment and proposed merger regulations. As to rule 21, it requests that the 3-day grace period for responsive pleadings to pleadings served by mail, which was considered in drafting this rule, be entered. As to rule 22(a), AAR requests that in addition to service by first-class mail, service be permitted by parcel service offering speed of delivery at least equal to first-class mail. Such a provision assertedly would save enormous mailing expenses on bulky filings. As to rule 40, it requests that the Commission clearly indicate by parenthetical notation or some other manner that this rule does not apply to rail abandonment or merger proceedings. As to rule 42(g), AAR suggests that a provision to the effect that protests which failed to satisfy the requirements of this rule will not be considered. As to rule 57, it strongly supports the provision for discovery by petition only, but suggests the Commission establish an expedited schedule for the handling of such petitions. As to rule 58(b), AAR states that the reference in this rule to rule 59(c) be stricken since rule 59(c) is deleted.

As to rule 68(a)(3), it suggest that replacing "either or both parties" with "any and all parties" would clarify the rule. As to rule 70(a)(2), AAR states its support for this rule. As to rule 73, it states that the comments to the rule indicate that it applies to abandonment proceedings but the rule itself refers only to proceedings arising under section 1(18) of the Interstate Commerce Act while abandonments are now authorized under section 1(a) of the act. It also feels that participation without intervention is inconsistent with section 1(a) of the act. As to rule 88, AAR feels that Administrative Law Judges should be required to consult with the parties participating in the hearing before oral argument is substituted for written briefs. It also suggests that "reasonable notice" should require that the hearing officer give notice on the first day of the hearings or as soon as possible after the commencement of the hearings. As to rule 95, AAR feels that a reading of this rule in conjunction with rules 101, 102, and 103 indicates no full exception or petition for reconsideration procedures exist for initial decisions by a division of the Commission, even though it is the first decision in a rail proceeding. It feels that such a procedure should be available.

As to rule 102(c), it feels it is unclear as to whether rule 102 or 103 applies in a proceeding involving both railroads and other transportation modes subject to the Commission's jurisdiction. It feels railroads which are parties to such proceedings should be afforded the same opportunity for the filing of administrative appeals as all other parties. As to rule 103(a), AAR complains that limits on petitions under this rule are unfair when such petitions are to first decisions of a division of the Commission and argues that the time for filing should be extended from 20 to 40 days. As to rule 105, it feels that the Commission should define the events (such as "assignment" of a proceeding) which are adopted from the 4R Act and which would start the running of described time limits. As to appendix "C"—Ex Parte Communications, AAR recommends that the prohibition against Ex Parte Communications not be extended to rulemaking proceedings since it feels such a prohibition is not required by the Administrative Procedure Act and because it feels informal consultations are very useful in such proceedings.

6. Chicago, Milwaukee, St. Paul and Pacific Railroad Company.—As to rule 57, Chicago, Milwaukee, St. Paul and Pacific Railroad Company opposes the proposed changes in the discovery rules because such changes would make the use of discovery completely discretionary with the Commission and would make such use very difficult because of the time limitations imposed. It feels that the existing procedures have not been abused and that the old rules were closer to those employed in the Federal courts.

7. National Industrial Traffic League (NITL).—As to rule 21, NITL requests that the 3-day grace period for responsive pleadings to pleadings served by mail which had been considered by the rules committee be adopted because it provides protection against poor mail service and because it is consistent with the Federal Rules of Civil Procedure. As to rule 57, it objects to the change requiring a petition and a showing of good cause before interrogatories and admissions may be used. It feels that the old rule should not be abandoned but rather the Commission should more closely police the use of such procedures to prevent abuses. As to rule 62, NITL recommends that this rule require that interrogatories be served at least 20 days before the commencement of oral hearings or before the date for serving any statement on modified procedure.

As to rule 63, it recommends that this rule require that request for admissions be served at least 20 days before the commencement of oral hearings or before the date for serving any statement on modified procedure. As to rule 70, NITL requests that this rule contain language to the effect that bench decisions should not be utilized in proceedings involving complex issues of fact or law, or in unopposed proceedings. As to rule 87, it feels that this rule should be modified to clearly permit interlocutory appeals from rulings on nonevidential matters (other than discovery) in each of the five set of circumstances set forth therein. As to rule 88, NITL requests that this rule be amended to prevent a hearing officer from requiring the presentation of oral argument in lieu of briefs at the close of testimony in oral hearings where such proceedings involve complexed issues of fact or law or where the proceedings are unopposed. As to rule 98, it asks the Commission to consider permitting a maximum of two counsel to present arguments for each side in order to insure the presentment of the diverse interests of parties on one side of a case. As to rule 101(b)(3), NITL asks that page limitations on exceptions be 30 pages when reproduced by standard typographic printing and 50 pages when reproduced by other processes. It states this would be consistent with the Federal Rules of Appellate Procedure and would not increase the actual amount of material presented. As to rules 102(a), and 103(a), it feels that no good reason has been shown why rail proceedings should be treated differently than nonrail proceedings in regard to appeals to the same division (or to the Commission) when the division modifies, changes, or reverses a prior decision and that different treatment is not consistent with the spirit of even-handed regulation. As to rule 200, NITL agrees with this rule but it urges that such rule not be construed as prohibiting a party filing an appeal to division 2 from including in such an appeal commentaries on or summaries of matter already submutted to the Board.

8. The Transportation Association Of America (TAA).—TAA generally states its support for the Commission's efforts to reduce regulatory lag and cities specific rules which it feels contributes toward this end. However, it also feels that much regulatory delay is a result of the Commission's slow processing of the cases before it. Therefore, it recommends that the rules impose time limitations applicable to the activities of the Commission and request that if such recommendation is deemed too broad that its pleading be regarded as a request for a new rulemaking proceeding for the purpose of incorporating time limitations on the Commission in the General Rules.

9. The Board of Trade of Kansas City, Missouri, Inc. (Board).—As to rule 88, the Board feels that oral arguments should be used at the end of a hearing only if all litigants concur. As to rule 98(d), it would like this rule amended to provide all active litigants with an opportunity to be heard. As to rule 103(a), the Board feels that the limitation contained in this rule regarding the appeal to the division of initial decisions modified or reversed by the division constitutes a denial of due process.

10. Champion International Corporation (Champion).—As to rule 5(e), Champion objects to the removal of supporting shippers or witnesses appearing at oral hearings from the definition of a "party" because it feels it is necessary that it be included in the service of matters concerning proceedings it supports. As to rule 21, it feels that the 3-day grace period on service should be initiated because of the unreliable nature of the mail service.

As to Rule 42(a), Champion states that the rule is ambiguous in that section 202(e) of the 4R Act requires a protest to include a complaint but that section (a) of this rules invites protestants to file a subsequent formal complaint. It feels that some differentiation must be made between the required included complaint and the optional formal complaint. As to rule 88, it would like to specifically state its support for the oral argument in lieu of briefs proposal. As to rule 101(b)(3), Champion feels that the length of exceptions should not be set at 30 pages but rather should be limited to the length of the initial or tentative decision.

11. Grain Processing Corporation (GPC).—As to rule 15, GPC states that this rule should be adjusted to include reproductions by typewriters, zerox machines, and other methods resulting from technological advances. As to rule 17, it requests that the exceptions to the allowance that a pleading, document, or paper signed in conformity with this rule need not be verified, be eliminated. As to rule 27(d), GPC ask that "unabbreviated names" be changed to "names."

As to rule 50, it seeks the elimination of this rule and suggests that rule 17 be used for modified procedure proceedings. GPC also generally argues that all 10- and 20-day time limits be replaced with 30-day time limits.

12. National Small Shipments Traffic Conference, Inc. (NSSTC) and Drug and Toilet Preparation Traffic Conference (DTPTC).—As to rule 73, NSSTC and DTPTC recommend that the rule be extended to apply to proceedings in which the justness or reasonableness of any rate, rule, charge, or other provision of a tariff is at issue and in

which the Commission has ordered that the proceeding be heard under the modified procedure. They argue that such an amendment will save the expense and Commission's time involved in the processing of petitions for leave to intervene in rate investigation proceedings. As to rule 102(g) and 103(f), NSSTC and DTPTC seek an amendment to these rules which would permit replies to petitions to stay whenever any party would be adversely affected by Commission approval thereof. They argue that without such an amendment that Rules of Practice will be tilted in favor of carriers over shippers and would significantly adversely affect subsequent rights of shippers.

13. National Motor Freight Traffic Association, Inc. (NMFTA).—As to rule 42(b), NMFTA recommends that this rule be amended to provide a time limitation of "12 working days" rather that "12 days" in order to provide more time for replies and to make due dates more certain. As to rule 57, it recommends that this rule be amended to "provide that the discovery procedures may be used only when the Commission upon its own motion, or upon a verified petition filed by a carrier, and upon good cause shown, shall have entered an order approving such use. Upon the entry of such order, to the extent that it is determined to be necessary to permit the use of the discovery sought, the Commission shall extend for a reasonable time the procedural time limits including the established dates for hearing or for submission of initial statements under the modified procedure. Provided that the Commission is satisfied that the discovery is not being interposed as a dilatory tactic." They feel this will permit the full use of discovery and will result in time savings and more accurate decisions.

14. Brown Transport Corp. (Brown).—As to rule 11, Brown seeks a clarification that this rule does not prevent the appearance of a carrier's full-time employee at hearings in the dual capacity of advocate and witness for such carrier. It asserts that this has been a traditionally accepted practice which has recently been called into question but that such practice is an economic necessity for many carriers.

15. Southern Motor Carriers Rate Conference, Inc. (SMCRC).—As to rules 101 and 102, SMCRC seeks clarification of the distinction between "administrative appeals" in rule 101 and "petitions for administrative review" in rule 102.

16. Pilot Freight Carriers, Inc. (Pilot).—As to rule 5, Pilot would amend this rule, in pertinent parts, to read as follows:

> (f) The term "attorney at law" means a person who has been admitted to practice before the courts of these United States and authorized by the Commission to appear before it, and who is not a full-time "employee" of an individual, corporation, partnership, or association within the meaning of the term full-time "employee" as set forth in paragraph (h) of this part and in Rule 12. (g) The term "practitioner" means a person who has been authorized by the Commission to appear before it as set forth in Rule 9, who is not a full-time "employee" an individual, corporation, partnership, or association within the meaning of the term full-time "employee" as set forth in paragraph (h) of this part and in Rule 12. (h) The term "employee" means a bona fide officer or a full-time employee of an individual, partnership, corporation or association, who qualifies to appear before the Commission under Rule 12. (i) The term "dual-capacity" means an "employee" representative as defined in paragraph (h) of this part and in rule 12, who appears as both representative and witness for its full-time employer, in a single or the same proceeding or consolidated proceedings on behalf of his full-time employer. (1) The term "initial decision" means an officer's

statement of findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record and an appropriate order. An initial decision made by a Commissioner, Administrative Law Judge or a joint board will become effective as the order of the Commission in the circumstances described in Rule 95(b). (m) The term "tentative decision" means a decision proposed by the Commission, which shall embrace the same elements specified for inclusion in initial decisions. A tentative decision will not become the decision of the Commission through failure to file objections, but in the absence of exceptions of ascertainable error, the statement herein of the issues and facts ordinarily will be taken by the Commission as the basis of its subsequent decision. (n) The term "transcript" means a written or electronically recorded statement of all proceedings at an oral hearing.

As to rule 7, it seeks to add an exception at the end of this rule which would permit corporations and firms to be admitted to the extent that authorized employee signatures are maintained in the Register of Authorized Employee Representatives signatures under rule 12(d). As to rule 9, it seeks to amend this rule to indicate that a licensed nonattorney practitioner "is" permitted to practice before the Commission rather than "may be" permitted. As to rule 10, Pilot would add a reference to its proposed rule 12 as well as rule 71 for additional information on appearances. As to rule 12, Pilot seeks to substitute for this proposed rule the following:

Rule 12 Employees-full-time employees of an individual, partnership, corporation, or association. (a) In general. Any citizen or resident of the United States who is a full-time employee of an individual, partnership, corporation, or association may represent such individual, partnership, corporation, or association before the Commission either in single capacity of representative or in the dual capacity of representative and witness, whether or not such person is admitted to practice before this Commission under Rule 8 or Rule 9. (b) Forfeit of right to dual capacity. Any full-time employee of an individual, partnership, corporation, or association who is admitted to practice before this Commission under Rule 8 or Rule 9 shall forfeit the right to appear before this Commission in a dual capacity if such person exercises admission to practice before this Commission under Rule 8 or Rule 9 by the representation of clients. (c) Initial appearances. Employees shall file a declaration that they are authorized to represent the employer in whose behalf they are authorized to act at the time of making an initial appearance in any proceeding. This requirement will be met by the employee entering his name as a representative of an applicant in the appropriate space on an application form; by signing any complaint, petition, protest, reply, or other pleading with a designation following the representative's signature that he is a representative of the party (employer) named; by entering an appearance on the form provided at any hearing; or by filing a letter with the Secretary of the Commission stating that he is authorized to represent the party (employer) whose name and address is given in a particular proceeding which shall be identified. For additional appearances, see Rules 10 and 71. (d) The Commission's Register of Authorized Employee Representatives' signatures. An officer of a corporation or organization authorized to make a complaint under the Act shall file a declaration with the Secretary of the Commission authorizing the signature of the representative employee for the filing of a pleading, document, paper or complaint on its behalf in the form as shown in Appendix D (b) to this part, in which event the representative's name will be entered in the Register of Authorized Employee Representatives' signatures. Once an employee's name is entered in the Register of

Authorized Employee Representatives' signatures no further declaration of the authorized signature will be required by the authorizing corporation or organization by whom the employee representative is employed. If, for whatever the reason, the authorized employee no longer performs representative's responsibilities before the Commission on behalf of the corporation or organization, then such corporation or organization shall request removal of the authorized employee signature from the Register on its behalf by a letter to the Secretary of the Commission. The full-time employee may also request removal of his name from the Register.

As to rule 17, it would extend the attestation and verification procedure of section (a) to attorneys at law and would replace section (b) with the following: "(b) Employee's signature. A pleading, document, or paper signed by an employee under Rule 12 must be signed in ink, the name of the employee's employer and the address of the signer shall be stated. Only those employees whose signatures are authorized by a declaration to the Secretary of this Commission by an officer of the corporation or organization authorized to make a complaint under the Act and on whose behalf the pleading, document, or paper is filed shall be recognized. The signature of the employee constitutes a certificate by him that he has read the pleading, document or paper; that he is authorized to file it; that to the best of his knowledge, information and belief there is good ground for it; that it is not interposed for delay and that with respect to a complaint, he filed it with the distinct knowledge and specific consent of complaintant. A pleading, document, or paper thus signed need not be verified or accompanied by an affidavit except as otherwise provided respecting applications (Rule 38), modified procedure (Rule 50), and statements of claimed damages (Rule 100)." As to rule 71, pilot would amend section (a) of this rule to read: "(a) Who may appear. In addition to attorneys at law under Rule 8; practitioners under Rule 9; and full-time employees under Rule 12, any individual may appear for himself and any member of a partnership which is a party to any proceeding may appear for such partnership upon adequate identification." As to appendix A, it would amend appendix A, in pertinent parts, as follows:

PREAMBLE

For the purpose of this part the term "practitioners" shall include attorneys at law under Rule 8, practitioners under Rule 9, and employees under Rule 12.

No rules of conduct can be framed which will particularize all the duties of the practitioner in the varying phases of litigation or in his relations to clients, adversaries, other practitioners, the Commission and the public. The following canons of ethics are adopted as a general guide for those admitted to practice before the Interstate Commerce Commission under Rules 8, 9, or 12. Should additional canons be necessitated due to unforseen future situations, such canons will be added to or amended accordingly. The word "Commission" as used herein includes Divisions of the Commission, and the representatives of the Commission, whether members, hearing officers, or other employees connected with the matter in hand.

CANONS OF ETHICS

1. Standards of ethical conduct before the Interstate Commerce Commission to be observed. These canons are in the furtherance of the purpose of the Commission's rules of practice which enjoins upon all persons appearing in the proceedings before it to conform thereto." As to appendix D, Pilot would add a part (b) as follows: "(b) DECLARATION OF AUTHORIZED EMPLOYEE'S SIGNATURE

I, ______________, ______________________________
(Name) (Title) (Place)

____
(Name of Corporation or Organization) (Address).

______________________________authorized to file complaints
a (Specify Corp. or Org.)

under the Act, do declare that ______________________________,
(name) .

full-time employee of ______________________________
(name of Corp. or Org.)

is hereby authorized to sign any complaint, petition, protest, reply or other pleading

or paper on behalf of said ______________, and to appear on behalf
(specify Corp. or Org.)

of said ______________________________before the Interstate
(specify Corp. or Org.)

Commerce Commission in the capacity of Representative and/or in the dual capacity of Representative-Witness until such time as this Declaration is rescinded by letter from an Officer of this ______________________________
(Specify Corp. or Org.)

to the Secretary of the Interstate Commerce Commission. The Signature of

______________________________is witnessed
(Name)

below. ______________________________
(Name) (Title)

Signature of Authorized Representative. ______________________________
(Signature)

Witness: ______________________

Witness: ______________________

Subscribed to and Sworn before me this ______________day of

______________, 19, in the County of ______________,

State of ______________________.

____
Notary Public

(SEAL) My Commission expores ______________."

Generally, the proposed revisions collectively provided for a full-time employee-representative before the Commission and the allowance of dual capacity and permit persons admitted to practice as an attorney or a practitioner who is also a full-time employee to be a full-time representative if the employer so qualifies him.

17. Harry N. Babcock, James R. Paschall, and John J. Paylor—attorneys.—As to rule 4(d), these attorneys ask the Commission to consider adding "irrevelant" or "frivolous" material, material violative of the rules of evidence, and new matter on reply or on exceptions to that which it may order stricken. As to rule 15, Babcock, Paschall, and Paylor ask that the Commission, in order to save expense and time, drop the requirement that a pleading in excess of 50 pages be printed and suggest that this rule be replaced with a requirement that briefs of more than 50 pages be reproduced on both sides of the page. As to rule 16, they recommend that the number of copies required be reduced to five.

As to rule 19, these attorneys request that recitals of material and relevant facts not be accepted as evidence unless separately stated and verified. As to rule 21(a), they would like the Commission to be specific as to whether this method of time computation is applicable when measuring backwards and to adopt the 3-day grace period when service is made by mail. As to rule 21(b), they would like the Commission to define "other documents" and to remove the prohibition against requests for extension within 10 days of a due date. As to rule 23(b), they query as to whether the Commission believes the rule is clear that a reply to a reply can be permissible under some circumstances such as under rule 51, or is a clarification of this rule required. As to rule 34, these attorneys query as to whether the rule should provide that service other than personal service can only be made if no agent for service has been designated.

As to rule 4(b), Babcock, Paschall, and Paylor state that the refusal in this rule to grant a few extra days for timely filing is indicative of the attitude to increase burdens on parties appearing before the Commission for the purpose of avoiding "administrative lag" with no real substantial time savings and very real possible detriments. They feel longer time limitations and concommitant reforming of internal Commission processes would be a better method of reducing administrative lag. In support of its comments regarding rules 4(b), 21(a), and 103(d), these attorneys cite specific examples of delays they have experienced in receiving mailings from the Commission.

As to rule 62(a), Babcock, Paschall, and Paylro feel that the rule is unclear regarding the service of interrogatories in that the number of copies is not specified, nor is it stated that answers must be filed with the Commission nor is the form of service or number of copies for the Commission specified.

As to rule 42(a) and (g), they feel (a) and (g) should be combined to provide that a protest against revision of rail rates and charges should be a verified complaint and that the prayer of such verified complaint should be limited to a request that the protested matter be suspended and investigated. These attorneys also query as to whether this rule should make reference to the rules on market dominance once they are finalized and whether it should require a reference to the effective date of the protested tariff or schedule. As to rule 46(b), they argue that a party should be able to waive the filing of a reply without being deemed in default and that even a defaulting party should be entitled to a notice of the disposition of a proceeding. As to rule 48, these attorneys assert that parties having a common interest in a proceeding should be required to file a joint pleading only "to the extent practicable." As to rule 49(a), they propose that this rule state that specific detailed admissions or denials, separately stated are not required in a defendant's pleading, but that defendant's pleading must contain a statement of fact and argument which is well-organized and directed at the issues and material allegations.

As to rule 51, Babcock, Paschall, and Paylor would like longer time limits. As to rule 55(b), these attorneys feel that the requirement that the party desiring a written transcript of an electronically recorded proceeding also furnish two copies of the written transcript to the Commission is unfair and should be eliminated. As to rule 57, they feel that the time constraints imposed on the use of discovery should be changed because such constraints make the use of discovery virtually impossible. As to rule 60(a) and (d), Babcock, Paschall, and Paylor feel that examination and cross-examination of witnesses should be limited to the subject matter specified in the order pursuant to rule 58(c). As to rule 60(h), they feel this rule should provide for personal delivery of a deposition to the Commission in lieu of registered mail. As to rule 60(j), these attorneys feel this rule should contain a provision protecting the confidentiality of material in any deposition if an order has been entered pursuant to rule 57(c). As to rule 62(b), these attorneys feel all privileged and proprietary information should be protected by this rule.

As to rule 68, they feel that this rule should permit parties to move for a prehearing conference. As to rule 70, Babcock, Paschall, and Paylor fear that the authority to grant bench decisions to too broad and could be abused in complex rate or finance matters. As to rule 88, these attorneys feel oral argument in lieu of briefs should be made only by agreement of the parties. As to rule 91(d), they seek clarification as to whether an abstract of evidence may be contained in an appendix or other document separate from a brief and state their opinion that printing requirements should not apply to abstracts. As to rule 98(d), Babcock, Paschall, and Paylor feel that the proponent should be allowed to reserve some of its time for rebuttal argument and that more than one counsel should be heard on one side if there are multiple parties on such sides. However, they feel the Commission could require that all the parties on one side not exceed a set amount of time alloted to it collectively. As to rule 101(b)(1), these attorneys feel the rule should indicate that a consistent page limitation exists for all petitions for rehearing, reargument, and reconsideration and state clearly what the limitation is.

As to rule 101(e)(2), they state that it should make clear that exceptions can be made on findings of fact and conclusions of law not made in the initial or tentative decision but which the party believes are necessary and proper. As to rule 101(b)(3), Babcock, Paschall, and Paylor object to the 30-page limitation on exceptions and offer alternatives such as eliminating any page limitation, at least where no written briefs have been filed, increasing the limitation to 70 pages, increasing the limit to 30 pages, exclusive of index and appendix, plus 1 page for each page of the initial decision in excess of 30 pages, and allowing relief from the limitation in specific cases by petition or by the Commission's motion. As to rule 103(c), they believe that the 10-page limitation is inadequate where the petition is a first appeal, where the petition is from a decision which reverses or modifies a prior report, and where the proceeding is one of unusual length. As to rule 103(d), Babcock, Paschall, and Paylor object to the 20-day limitation for filing exceptions and petitions in rail cases because they do not believe it is required by section 17(9)(b) of the Interstate Commerce Act and because it will be burdensome in many instances.

As to rule 103(e), these attorneys urge that decisions of employee review boards be specifically mentioned in the rules.

18. White and Southwell.—As to rule 4(b), White and Southwell feel it is unfair to practitioners and attorneys outside of Washington, D.C., to not extend the time limitations on filings with the Commission. As to rule 21(b), these attorneys suggest

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that the deadline for requests for extensions be reduced from 10 days prior to the due date to 5 days prior to the due date. As to rule 51, they argue that requiring statements under modified procedure to be filed within 20 days from the date of service of an order fails to recognize that an order is not usually received until a number of days after service. As to rule 57, White and Southwell argue that this rule will effectively preclude the use of discovery without giving it a fair opportunity and that encouraging the use of discovery would be a better means of reducing regulatory lag. As to rule 62, these attorneys feel written interrogatories should not be subject to the provisions of rule 57(a). As to rule 63, they argue that request for admissions should not be subject to the provisions of rule 57(a).

As to rule 88, White and Southwell state their support for the provision for oral arguments in lieu of written briefs. As to rule 101(b)(3), these attorneys state generally their support for rule 101 but that they are opposed to the strict 30-page limitation on pleadings. As to rule 102(g), these attorneys argue that petitions for stays of Commission orders should be permitted any time within 10 days after a petition for judicial review has been filed. They feel that the proposed filing requirements would result in an increased number of appeals to the Federal courts. As to rule 103, White and Southwell object to the loss of an additional administrative review where an initial decision of a division or Commission has been modified or reversed. They feel this removal is violative of due process and is an arrogant act by the Commission. Also, these attorneys feel petitions for stays of decisions under this rule should be permitted up to 10 days after the filing of the petition for judical review. As to rule 105, White and Southwell propose that this rule change the due date from 20 days after the service date to 30 days after the service date. They feel the Commission is unfairly shifting the onus of reducing regulatory lag from itself to the parties practicing before it.

19. Gordon P. MacDougall.—This practitioner generally states that the proposed rules are highly unsatisfactory, should not be adopted, and result from a misapprehension of section 303 of the 4R Act. As to rule 16, he questions who will be eliminated from access to pleadings by the proposed further reduction to six copies. As to rule 23, this practitioner states that the hard and fixed rule for securing an extension of time appears to be a battle between agency staff and the public and that this inflexible rule is inexcusable. As to rule 40(b), MacDougall feels that the deletion of the present provision that failure to file a timely protest shall not prejudice subsequent participation in the proceeding will benefit carriers at the expense of the public. As to rule 73, this practitioner states the end of the right to participate in section 5 proceedings by entry of an appearance (and without filing a petition for leave to intervene) will reduce the large participation from the public in important proceedings. As to rule 88, MacDougall feels that the use of oral arguments in lieu of written briefs will make it more difficult for interested parties inside and outside the Commission to obtain access to information.

As to rules 101, 102, and 103, he argues that the limited grounds for exceptions and the finality of division decisions are not in keeping with the spirit of the 4R Act and have the effect of insulating staff personnel from meaningful agency review.

20. Heim, Kodim, and Canter.—Canter generally feels the rules as to times for filing discriminate against nonlocal attorneys and practitioners. To correct this situation he asks that either rule 4(b) or rule 22(a) be amended. As to rule 4(b), Canter proposes that this rule be amended to provide that pleadings be considered timely filed if certified as having been deposited in the mail as late as a due date for the same and actually received at the Commission no later than 5 days after the due date. As to rule

22(a), he proposes that this rule be amended to provide either: (1) that if pleadings are personally filed or delivered to the Commission on the due date with copies being certified as having been simultaneously mailed to all other parties, the time for filing of the responsive pleading be deemed automatically extended by 5 days, or (2) that all parties be required to mail all pleadings to the Commission and each other at least 2 days to the due date for the same period.

21. Motor Carrier Lawyers Association (MCLA).—Committee On Practice And Procedure: MCLA generally proposes that a task force of Commission employees and members of the Commission's bar be formed to analyze problems of the Commission's workload both internally and externally and provide solutions. As to rule 57, it would modify this rule to allow the use of interrogatories and request for admission in proceedings other than those under sections 206 and 209 of the Interstate Commerce Act without having to file a petition and show good cause. MCLA feels abuses of discovery have been confined to sections 206 and 209 proceedings. As to rule 70, it would amend this rule to give hearing officers authority to rule on matters, regulate the procedure, and issue subpenas after the proceeding is assigned but prior to the hearing, and to allow them power to decide motions involving final determination of the proceeding. As to rule 101, MCLA asks that this rule be amended to allow relief from page limitations under extraordinary circumstances and to change the limitation to 50 pages where no post-hearing briefs have been filed. As to rule 102, it would amend this rule to afford relief from the 10-page limitation in extraordinary circumstances.

22. Joseph G. Dail, Jr., attorney.—As to rule 101(b)(3), Dail believes the page limitation on exceptions is arbitrary, fails to recognize the complexity of many proceedings, will result in more petitions being filed, and will hamper just determinations of proceedings.

23. Association of Interstate Commerce Commission Practitioners (AICCP).—As to rule 57, AICCP would like a clear statement in this rule that all forms of discovery may be used by mutual agreement of the parties in the absence of a Commission order. Also, it would like specified times for the filing of petitions for discovery and replies and for Commission action on such petitions. As to rule 88, AICCP requests that the rule require notice at the opening of the hearing if oral argument is to be used in lieu of briefs. As to rules 102(g) and 103(f), it states that these rules should permit replies to petitions for stays of decisions, orders, or requirements pending a request for judicial review. In rule 103(a), as in rule 102(a), AICCP requests that administrative appeals be permitted to decisions, order, or requirements, issued by the division or Commission in the first instance.

24. LeBoeuf, Land, Leiby, and MacRae, attorneys.—As to rules 57, 62, and 63, these attorneys oppose those parts of these rules which limit the availability of interrogatories and request for admissions. They argue that the present rules more properly conform to the recommendations of the Administrative Conference of the United States, and reduce rather than increase delay and suggest that the use of stronger sanctions for abuse of discovery procedures would be a better alternative.

25. MacLeay, Lunch, Bernhard, and Gregg, attorneys.—As to rules 62 and 63, these attorneys object to those portions of these rules which subject them to the petition and showing of good cause provisions of rule 57. They argue that the Commission should not automatically penalize all its practitioners for the existent abuses, that such abuses should more properly be dealt with through santion provisions, that the benefits of liberal discovery inure to both the Commission and the parties, and that tighter discovery rules will result in more petitions.

26. J. Raymond Clark, attorney.—As to rules 57, 62, and 63, this attorney urges the restrictions imposed on discoveries in these rules not be adopted. He states that the limiting of discovery runs counter to progressive Federal court procedures, results in harm to the parties, and is inconsistent with the rationale of the report adopting the discovery rules. Clark suggests that abuses may be corrected by more efficient sanctions and delays can be reduced by requiring that discovery motions be filed with specified pleadings and by reducing time limitations.

27. Smart and Bartsch, attorneys.—As to rule 4, Smart and Bartsch request that this rule be amended to provide more time for filing pleadings with the Commission. In support of their position, they attach a survey which indicates an average time lapse of 4.9 days between the date of service of Commission orders and the date such orders are received by their office and 7.6 days between mailing and receipt of the Federal Register.

28. Butler, Snow, O'Mara, Stevens, and Cannada, attorneys.—These attorneys generally complain that rules 4(b) and 22(a) discriminate against nonlocal attorneys and practitioners. As to rule 4(b), these attorneys ask that this rule be amended to provide that a pleading be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is used, or, alternatively, to provide that pleadings may be filed at any Commission field office. As to rule 22(a), they ask that this rule be amended to provide that when delivery is made to the Commission in person, and service upon other parties is not made in person, service shall be made by mail upon parties not less than 3 days prior to the due date, if any, for such filing.

29. Thomas F. McGrath, practitioner.—As to rule 9, McGrath states his belief that the increase in the fee from $25 to $50 is oppressive and he requests that such fee remain $25.

As to rule 40(b) McGrath states his support for the revision which deletes the last sentence of this rule.

30. Richard J. Lee, practitioner.—Lee generally comments that he believes a rule should be enacted which would allow a registered practitioner who is preparing a tariff for a client to sign the transmittal letter which will accompany the tariff without being required to have a signed power of attorney. Also, he believes that the Rules of Practice and the Canons of Ethics should be revised to allow practitioners to advertise the availability of their services. As to rule 7, Lee requests that this rule provide that anyone preparing any document or tariff to be presented to the Commission for a client and for a fee should be a practitioner. He seeks to insure that "rate auditing" firms do not represent clients before the Commission for a fee unless the work is done by a practitioner. As to appendix A, he would like the code of ethics amended to permit practitioners to advertise.

31. John Coon, practitioner.—As to appendix A, Coon asks that Canon 1 be amended to require that practitioners conform only to the Standards of Ethical Conduct therein while attorneys must also conform to the Standard of Ethical Conduct required of practitioners before the courts of the United States. He feels this will clearly indicate that practitioners will be permitted to appear before the Commission in the dual capacity of both advocate and witness.

32. Robinson, Felts, Starnes, and Nations, attorneys.—These attorneys adopt by reference the first recommendation of Butler, Snow, O'Mara, Stevens, and Cannada which provides that a pleading be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is used.

33. Midwest Packers Traffic Association (MPTA).—As to rule 247, MPTA requests that a section (j) be added stating as follows: "*Shipper support.* Shipper support statements shall be considered *prima facie* true and correct." It additionally suggests that 49 CFR 1131.2(d) Temporary Authority Applications—Filing of Applications be amended to add the following: "(5) In those cases involving a single trip only, the appropriate Bureau of Motor Carriers field staff member may grant emergency temporary authority by telephone before any supporting documentation is received and without any verification of absence of existing carriers' service when verbally advised by supporting shipper representative of the following: (a) The name and address of the shipper and carrier and the identity of the shipper representative making the representation; (b) that a load must be moved immediately and that no existing carrier can or will provide equipment to move said load; (c) the specific origin(s) and destination(s) and the scheduled or estimated time for arrival at the final unloading point; (d) that the rate to be paid for such load is no lower than existing established rates on like commodities between the points involved; (e) that the shipper is aware of the provisions of 18 U.S.C. 1001. Telegraphic confirmation of this data will be sent to the I.C.C. field offices by the shipper. In such situations, the proper documentation must follow the grant and must be sent to the appropriate Bureau of Motor Carrier field office with a shipper certification that contains the following language: 'I hereby acknowledge that knowing and willful misstatements or omission of material facts constitute Federal criminal violations punishable by up to five years imprisonment and fines up to $10,000 for each offense. See: 18 U.S.C. 1001.'" MPTA also seeks to add to 49 CFR 1131.2 a Section (12) as follows: "(12) The information contained herein shall be considered *prima facie* true and correct."

34. Cooper Motor Lines, Inc. (Cooper).—Cooper states that it generally supports the proposed changes submitted by Pilot Freight Carriers, Inc., and it specifically supports the proposed rule in amended appendix D paragraph (b) *Declaration of Authorized Employee's Signature.*

35. James H. Sweeney, practitioner.—As to rules 4(b) and 40(b), Sweeney requests that the Commission strictly enforce its requirements regarding timely filings. As to rule 5, he asks the Commission to preclude intervention by protestants which fail to meet a due date for the filing of a protest.

36. State Corporation Commission (S.C.C.)—State of New Mexico.—As to rule 9, S.C.C. suggests that the qualifications for practitioners be revised to require that all practitioner applicants be required to have a Bachelor's Degree in any of the various business disciplines.

37. Paul F. Sullivan, attorney.—As to rule 70, Sullivan requests that the Commission not permit the use of bench decisions because he feels that motor carrier cases warranting oral hearings are sufficiently complex to require a written decision and that Administrative Law Judges are paid by the taxpayers to perform such a function.

38. Thomas Harper, Don A. Smith, Tom Harper, Jr., and S. Walton Maurras, attorneys.—As to rules 4(b) and 22, these attorneys wish to join in the recommendations of Butler, Snow, O'Mara, Stevens, and Cannada and that they feel the time requirements on filings before the Commission result in a substantial prejudice against attorneys and practitioners outside the Washington, D.C., area.

39. Sea-Land Service, Inc. (Sea-Land).—As to rule 40, Sea-Land asks that the rule be amended to add that if the protest time is missed, an appropriately supported petition for leave to intervene must be filed. As to rule 88, it asks that either the provision in the notice of hearing that oral argument will be heard or an agreement by all parties at the hearing be considered reasonable notice. As to rule 98, Sea-Land

asks that this rule be eliminated, or, alternatively, amended to provide a specific procedure for requests for extensions of argument time.

ORDER

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - PRACTICE AND PROCEDURE
PART 1100 - RULES OF PRACTICE

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 1st day of March 1977.

EX PARTE NO. 55 (SUB-NO. 24)

REVISED RULES OF PRACTICE

It appearing, That by notice of proposed rulemaking and order published November 8, 1976, this Commission instituted a rulemaking proceeding for the purpose of revising the Interstate Commerce Commission's General Rules of Practice in order to facilitate and expedite proceedings before it.

And it further appearing, That tentative revision of the rules involved in this proceeding has been completed and that the Commission has made and filed its report herein which report is hereby referred to and made a part hereof;

It is ordered, That Part 1100 of Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended as set forth in the attached Notice of Adopted Amended Rules; that said notice be, and is hereby, adopted and is incorporated by reference into this order; that comments on this interim report are invited to be submitted on or before April 4, 1977; and that the attached notice will not be published in the Federal Register until after consideration of any comments (including those of the Administrative Conference) received during this final period for representations.

And it is further ordered, That this order shall become effective July 1, 1977, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - PRACTICE AND PROCEDURE
PART 1100 - RULES OF PRACTICE

EX PARTE NO. 55 (SUB-NO. 24)

REVISED RULES OF PRACTICE

NOTICE OF ADOPTED AMENDED RULES

PURPOSE: The purpose of this document is to notify the public that the Interstate Commerce Commission has adopted certain amended rules designed to improve and expedite the processing of specified proceedings.

By notice of proposed rulemaking published November 8, 1976, the Interstate Commerce Commission instituted the above-entitled proceeding for the purpose of amending the Interstate Commerce Commission's Rules of Practice. The Commission invited interested persons to submit written views, comments, suggestions, and pertinent evidence to the action proposed.

Upon consideration of the proposed rules and the representations filed, the Commission adopted the rules set forth below. These amended rules provide a total revision of the Rules of Practice.

The Commission's report in this proceeding summarizes the representations received, discusses the issues involved, and sets forth certain conclusions and findings. Generally, the implementation of these adopted rules will aid the Commission in the expeditious processing of proceedings before it without imposing any undue burden on any party to such proceedings.

The adopted amended rules have been found to be otherwise lawful and consistent with the national transportation policy.

By the Commission. The amended rules are scheduled to become effective July 1, 1977.

Accordingly, the following amended Rules of Practice (49 CFR 1100), have been modified and adopted.

§1100.1 *General information.*

(a) *Scope of rules.*—The rules in this part govern procedure before the Interstate Commerce Commission in proceedings under the Interstate Commerce Act, as amended, and related acts, except insofar as they may be inconsistent with and superseded by requirements governing the practice and procedure in specified categories of proceedings as set out in parts 1101-1159,[1] or unless otherwise directed by the Commission in any proceeding.

(b) *Applicability.*—Subpart A of this part sets forth general rules applicable to all types of proceedings, except to the extent otherwise provided in subpart B hereof which sets forth special rules applicable to particular types of proceedings. Wherever there is any conflict between one of the rules of general applicability in subpart A and a special rule in subpart B, the special rule will govern.

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[1] An index to parts 1101-1159 is set forth in appendix E hereto.

(c) *Reference to and citation of rules.*—This part shall be referred to as the "Rules of Practice." Each section, and any paragraph or subparagraph thereof, shall be referred to as a "Rule." The number of each rule shall include only the numbers and letters at the right of the decimal point. For example, "§1100.63 Request for admission" shall be referred to as "Rule 63." Paragraph (b) of that rule, relating to "Effect of admission," shall be referred to as "Rule 63(b)."

§1100.2 *Liberal construction.*

The rules in this part shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented.

§1100.3 *Information; special instructions.*

Information as to procedure under the rules in this part, and instructions supplementing these rules in special instances, will be furnished upon written application to the Secretary and Assistant Secretary of the Commission, Washington, D.C., 20423, or by telephone.

SUBPART A—RULES OF GENERAL APPLICABILITY

§1100.4 *Communications and pleadings generally.*

(a) *How addressed.*—All communications, including correspondence concerning matters referred to boards, should be addressed to the Commission unless otherwise specifically directed. All communications should clearly designate the docket number, if any, and short title. The person communicating shall state his address, the party he represents, and how response should be sent to him if not by first-class mail.

(b) *Timely filing required.*—Pleadings, requests, or other papers or documents required or permitted to be filed under this part must be received for filing at the Commission's offices at Washington, D.C., within the time limits, if any, for such filing. The date of receipt at the Commission and not the date of deposit in the mails is determinative, provided, however, that if such document is mailed by Certified or Registered mail postmarked at least 3 days prior to the due date, it will be accepted as timely filed.

(c) *Disposition of; when defective.*—In any proceeding when upon inspection the Commission is of the opinion that a pleading, document, or paper tendered for filing does not comply with this part or, if it be an application, does not sufficiently set forth required material or is otherwise insufficient, the Commission may decline to accept the pleading, document, or paper for filing and may return it unfiled, or the Commission may accept it for filing and advise the person tendering it of the deficiency and require that the deficiency be corrected.

(d) *Objectionable matter.*—The Commission may order any redundant, irrelevant, immaterial, impertinent, or scandalous matter stricken from any pleading, document, or paper filed with it.

(e) *Ex parte communications prohibited; penalties provided.*—Ex parte communications as defined in appendix C to this part are prohibited and any person violating the prohibitions set out in such appendix is subject to the penalties therein provided.

§1100.5 *Definitions.*

As used in this part:

(a) The terms "act" and "part" mean the Interstate Commerce Act and the several parts thereof, respectively. The term "act" also means, unless the context otherwise indicates, any other statute which the Commission administers in whole or in part.

NOTE: References to parts designated by Roman numerals refer to the Interstate Commerce Act. References to "this part," the rules in this part or to parts designated by Arabic numerals, refer to this Code.

(b) The term "proceeding" shall include: (1) an "informal complaint" filed under rule 24 or 25 or a "formal complaint" alleging violation of any provision of the act or of any regulation or requirement made pursuant to a power granted by such act, including petitions on the special docket; (2) an "application" for (i) the granting of any right, privilege, authority, or relief under or from any provision of the act or of any regulation or requirement made pursuant to a power granted by such act, or (ii) the consideration of any submission required by law to be made to the Commission; (3) an "investigation" instituted by the Commission; and (4) a "rulemaking" proposal instituted by the Commission.

(c) The term "complainant" means a person filing a complaint; "defendant" means a person against whom complaint is filed; "applicant" means a person filing an application; "respondent" means a person designated in an investigation; "protestant" means a person opposed to the granting of an application, to any tariff or schedule becoming effective, or to a tentative valuation; "intervener" means a person permitted to intervene as provided in rule 72 or 73, and "petitioner" means any other person seeking relief otherwise than by complaint, protest or application.

(d) The term "party" shall include all named in paragraph (c) above, or others, permitted or directed by the Commission to participate in a proceeding. It shall not include persons signing certificates of support or witnesses appearing at an oral hearing or submitting verified statements under modified procedure unless such persons are included in the preceding provisions of this rule, and shall not include persons named in the docket service list merely for the purpose of receiving copies of Commission releases.

(e) The term "pleading" means a complaint, answer, reply, application, protest, written comment, petition to investigate, motion (other than motion orally made at hearing or argument), brief, exceptions, petition, document supplementing oral hearing as described in rule 86 and all documents filed under modified procedure.

(f) The term "practitioner" means a person authorized by the Commission to appear before it in a representative capacity.

(g) The term "officer," except as a different meaning is indicated in rules 17(b), 57 to 67, inclusive, 71(a) and 78 (civil and corporate functionaries), includes a division, Commissioner, Administrative Law Judge, board of employees (called an "employee board" in this part), an examiner or special board composed of State representatives (called a "joint board" in this part), to which a proceeding (called "referred matter" in this part) is assigned or referred for hearing, consideration, or recommendation of an appropriate order thereon pursuant to provision of law.

The term "board" means either an employee board or a joint board as the context requires.

(h) The term "initial decision" means an officer's statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record, and an appropriate order. An initial decision made by a Commissioner, an Administrative Law Judge or a joint board will become effective as the order of the Commission in the circumstances described in rule 95(b).

(i) The term "tentative decision" means a decision proposed by the Commission, which shall embrace the same elements specified for inclusion in initial decisions. A tentative decision will not become the decision of the Commission through failure to file objections, but in the absence of exceptions or of ascertainable error the statement therein of the issues and facts ordinarily will be taken by the Commission as the basis of its subsequent decision.

(j) The term "modified procedure" means the procedure specified in rules 45 to 54, inclusive, which rules provide for the filing and serving of pleadings in proceedings with a view to limiting the matters upon which subsequent oral evidence, if any, will be introduced.

(k) The term "transcript" means a written or electronically recorded statement of all proceedings at an oral hearing.

§1100.6 *Use of gender and number.*

Words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; and words importing the masculine gender include the feminine.

PRACTITIONERS

§1100.7 *Register of practitioners.*

A register is maintained by the Commission in which are entered the names of all persons entitled to practice before the Commission. Corporations and firms will not be admitted or recognized.

§1100.8 *Attorneys at Law—qualifications and requirements for practice before the Commission.*

Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia may represent others before the Commission upon filing with the Commission a written declaration so stating that he is currently qualified. The written declaration shall contain the declarant's full name, address, and telephone number. A declaration may be filed with the Secretary of the Commission in the form as shown in appendix D to this part, in which event the attorney's name will be entered in the Register of Attorneys at Law. Attorneys may also file declarations with the Secretary or a hearing officer when making an initial appearance in any proceeding and the attorney's name will be entered in the Register of Attorneys at Law. Once an attorney's name is entered in the Register of Attorneys at Law no further declaration of qualification will be required except in those instances where an attorney's right to practice has been suspended, in which event a written declaration will be required that he is now properly qualified in accordance with this paragraph.

§1100.9 *Persons not attorneys at law—qualifications and requirements for practice before the Commission.*

(a) *In general.*—Any citizen or resident of the United States, not an attorney at law, who shall file an application for admission to practice, accompanied by payment of the fee prescribed by rule or order of the Commission, sucessfully complete the practitioners' examination, and show that he possesses the necessary legal and technical qualifications to enable him to render valuable service before the Commission and that he is competent to advise and assist in the presentation of matters before the Commission, may be permitted to practice before the Commission.

(b) *Application for admission.*—An application filed pursuant to this rule under oath for admission to practice shall be completed in full on the form provided by the

Commission, and shall be addressed to the Secretary of the Commission, Washington, D.C. 20423.

(c) *Additional certificates by applicant's sponsors: hearing on application: abandonment of application.*—The Commission may require an applicant's sponsors to provide a detailed statement of the nature and extent of their knowledge of his qualifications. Upon consideration thereof, if the Commission is not satisfied as to the adequacy of applicant's qualifications, he will be notified thereof by registered mail, whereupon he may request a hearing to prove his qualifications. If he presents such a request, the Commission will accord him a hearing. In the absence of a request for hearing within 20 days from receipt of said notice, his application shall be considered as withdrawn.

(d) *Application fee.*—Each application filed pursuant to this rule must be accompanied by a nonrefundable fee of $50. Payment must be made either in cash, or by check or money order payable to the Interstate Commerce Commission.

(e) *Failure to appear for examination.*—Except for good cause shown, if an applicant fails to appear at the time and place indicated by the Commission to take the practitioners' examination, the application shall be considered withdrawn.

(f) *Applicant's oath.*—No applicant shall be admitted to practice before the Commission until he shall have subscribed to an oath or affirmation that he will demean himself, as a practitioner before the Commission, uprightly, and according to law; and that he will support the Constitution of the United States and laws of the United States and will conform to the rules and regulations of the Commission.

§1100.10 *Initial appearances.*

Practitioners shall file a declaration that they are authorized to represent the particular party in whose behalf they propose to act at the time of making an initial appearance in any proceeding. This requirement will be met by the practitioner entering his name as the representative of an applicant in the appropriate space on an application form; by signing any complaint, petition, protest, reply, or other pleading with a designation following the practitioner's signature that he is the attorney for or other representative of a party therein named; by entering an appearance on the form provided at any hearing; or by filing a letter with the Secretary of the Commission stating that he is authorized to represent a party, whose name and address is given in a particular proceeding which shall be identified. For additional information on appearances, see rule 71.

§1100.11 *Suspension, disbarment, or other disciplinary action.*

When it is shown to the Commission that any member of its bar has been suspended or disbarred from practice in any court of record, or has violated any of the Commission's rules, including the code of ethics as set out in appendix A, or has engaged in other conduct unbecoming a member of the bar of the Commission, he will be subject to suspension, disbarment, or other disciplinary action by the Commission. The member shall be afforded an opportunity to show good cause, within such time as the Commission shall prescribe, why he should not be suspended, disbarred or otherwise disciplined. Upon his response to the order to show cause, and after hearing, if requested, or upon failure to respond within the time prescribed for a response, the Commission shall issue an appropriate order.

SPECIAL RULES RESPECTING JOINT BOARDS

§1100.14 *Joint board organization and procedures.*

(a) *Organization.*—After a joint board has been created it shall select one of its members to act as chairman for all purposes concerning matters which may be referred to it. In the event the member so selected is absent from any meeting of the joint board the members attending shall select one of such members, except as provided in paragraph (b) of this section, temporarily to act as chairman.

(b) *Waiver by absence of a joint board member.*—The failure of a duly appointed member of a joint board to participate in any hearing after notice thereof on a matter referred to such joint board shall be considered to constitute, as to the matter referred, a waiver of section on the part of the State from which such member was appointed.

(c) *Procedural rulings in case of disagreement.*—If the members of a joint board or a majority thereof in actual attendance at a hearing shall be unable to agree upon the disposition of a procedural question arising therein, the chairman (or acting chairman) of the board shall decide the question and rule or order accordingly.

(d) *Form of joint board's initial decisions; service.*—In the interest of uniformity the board's initial decision shall conform as nearly as may be practicable to the form of decision issued by the Commission in similar cases. The board's initial decision will be served by the Commission.

(e) *Termination of joint board jurisdiction; subsequent procedure.*—The jurisdiction of a joint board over a referred matter shall be terminated in the event of: (1) service of an initial decision as provided in parargraph (d) of this section; (2) submission of the board's conclusions without a written initial decision; (3) waiver of action in writing by appropriate authority of each State from which a member is entitled to be appointed; (4) failure of all members of the board to appear at the hearing; (5) failure of a majority of the board to agree on substantive matters; or (6) entry of order vacating the order of reference to the joint board. Except where an initial decision is served as provided in paragraph (d) of this section, in which event the subsequent procedure will be as provided in rules 101, 102, 103, and 104, a referred matter, after terminations of joint board jurisdiction, will be decided by the Commission or be made the subject of another officer's initial decision on the record, theretofore, made or after such hearing or further hearing as may be required.

PLEADING SPECIFICATIONS GENERALLY

§1100.15 *Typographical specifications generally.*

Except as otherwise provided respecting applications (rule 38(a)), exhibits (rule 84(a)), and informal complaints (rule 24(a)), all pleadings, documents, and papers to be filed under these rules shall be on opaque, unglazed, durable paper not exceeding 8 1/2 by 11 inches. To permit binding in covers of uniform size, margins of at least 1 1/2 and 1 inch, respectively, shall be allowed on the left and right margins. Binding shall be on the left margin. Reproduction may be by printing, printing by offset press, multigraphing, or mimeographing, or by any other process, provided the copies are clear and permanently legible. Whiteline blueprints which cannot be reproduced by photography are not acceptable. If directly typewritten, or if in facsimile reproduction of typewriting, the impression may be on both sides of the paper and must be double-spaced, except that long quotations shall be single-spaced and indented. Nothing less in size than Elite type shall be used. If printed, adequate leading and nothing less than 10-point type shall be used, except that 8-point type may be employed in footnotes and in tabular matter where printing limitations so require. If a pleading or brief is in excess of 50 pages (except a pleading under modified or shortened procedure), including cover pages, indexes, and appendixes, the impression must be on both sides. Printing by offset press will be accepted: Provided, That the type used is not reduced in size smaller than that required for typewritten documents. Failure to observe these specifications will result in rejection.

§1100.16 *Copies.*

The original and six copies of every pleading, document, or paper permitted or required to be filed under this part shall be furnished for use of the Commission except as a different number is otherwise specified in appendix F hereto which lists the various pleadings, documents, or papers normally filed with the Commission.

§1100.17 *Attestation and verification.*

(a) *Practitioner's signature.*—If a party is represented by a practitioner each pleading, document, or paper of such party shall be signed in ink by one such practitioner whose address shall be stated. The signature of a practitioner constitues a certificate by him that he has read the pleading, document, or paper; that he is authorized to file it; that to the best of his knowledge, information, and belief there is good ground for it; that it is not interposed for delay; and that with respect to a complaint he files it with the distinct knowledge and specific consent of complainant. A pleading, document, or paper thus signed need not be verified or accompanied by affidavit except as otherwise provided in these rules.

(b) *When no practitioner's signature.*—A pleading, document, or paper not signed by a practitioner must be signed in ink, the address of the signer shall be stated, and the facts alleged in a pleading must be verified under oath by the person in whose behalf it is filed. Signature and verification in such manner must be by at least one complainant if the pleading is a complaint. A pleading, document, or paper filed on behalf of a corporation or other organization authorized to make complaint under the act, which is not signed by a practitioner must be signed in ink, and the facts alleged in a pleading must be verified by an executive officer of such corporation or organization.

§1100.18 *Affirmation in lieu of oath.*

Whenever under this part an oath is required, an affirmation in judicial form will be accepted in lieu thereof.

§1100.19 *Pleadings part of record.*

Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, if separately stated and verified, and unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross-examination on the evidence so included in the record. Pleadings may contain specific references to or quotation from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations, or practices alleged to be material. A filing under rule 42, *Protests against tariffs or schedules*, shall not be considered a pleading for the purpose of this rule.

§1100.20 *Amendments.*

Leave to file amendments to any pleading will be allowed or denied as a matter of discretion.

§1100.21 *Time.*

(a) *Computation.*—In computing any period of time prescribed or allowed by this part, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is Saturday, Sunday, or a legal holiday in the District of Columbia, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a holiday. A half holiday shall not be considered as a holiday. This rule shall apply to the measurement of time forward, as well as backward from a specified date.

(b) When the date designated for filing briefs or other documents is a Saturday, Sunday, or a legal holiday in the District of Columbia, that date shall be extended to the next day which is neither a Saturday, Sunday, nor a legal holiday in the District of Columbia. A half holiday shall not be considered as a holiday.

(c) *Modification.*—Except as to the maximum time periods provided by law or specified in this part respecting informal complaints seeking damages (rule 25), any time period prescribed or permitted in this part may, upon request and for good and sufficient cause, be modified by the Commission in its discretion. Requests for extension or modifications of time must be served upon all parties of record at the same time and by the same method of communication as service is made on the Commission. A request for postponement of date for filing briefs or other documents must be filed not less than 10 days before the due date. Only the original of the request and certificate of service need be filed with the Commission. If granted, the party making the request shall promptly so notify all parties to the proceeding and so certify to the Commission.

§1100.22 *Service of pleadings and papers.*

(a) *Generally.*—Except as otherwise provided in paragraph (b) of this section, or as otherwise provided respecting applications (rule 38(b)), formal complaints (rule 34), and informal complaints (rule 24(b)), every pleading, document, or paper must, when filed, or tendered to the Commission for filing, include a certificate showing simultaneous service thereof upon all parties to the proceeding. Such service shall be made by delivery in person, or by first-class mail, or by express or equivalent parcel delivery service, properly addressed with charges prepaid, one copy to each party. Service upon the parties shall be by the same means of communication and class of service employed in making delivery to the Commission: Provided, however, That when delivery is made to the Commission in person, and it is not feasible to serve the other parties in person, service shall be made by first-class or express mail. When any party is represented by a practitioner, service upon such practitioner will be deemed service upon the party.

(b) *Exceptions as to letter.*—Copies of letters to the Commission relating to oral argument (rule 98) and subpenas (rule 56(a)) need not be served upon other parties to the proceeding.

§1100.23 *Replies and motions.*

(a) *Time for filing.*—Except that a reply on a reply is not permitted and except as otherwise provided in these rules, an adverse party may file and serve a reply to or motion addressed to any pleading permitted under the rules in this part within 20 days after the filing of such pleading at the Commission.

(b) *Replies to administrative appeals.*—A reply to an administrative appeal filed under rules 101 and 102 seeking a change in a decision, order, or requirement may be filed and served within 20 days after the final date for filing such administrative appeals.

(c) The original of the reply or motion should be accompanied by the same number of copies as required respecting the pleading to which the reply or motion is addressed.

COMMENCEMENT OF PROCEEDINGS

§1100.24 *Informal complaints not seeking damages. (rule 24)*

(a) *Form and content.*—Informal complaint may be by letter or other writing, and will be serially numbered and filed as of the date of its receipt. No form of informal complaint is suggested, but in substance the letter or other writing (original and one copy shall be filed) must contain the essential elements of a formal complaint as specified in rules 28 and 30. It may embrace supporting papers.

(b) *Correspondence handling.*—If the informal complaint appears to be susceptible of informal adjustment, a copy or a statement of the substance thereof will be transmitted by the Commission to each person complained of in an endeavor to have it satisfied by correspondence and thuse obviate the filing of a formal complaint.

(c) *Discontinuance without prejudice.*—A proceeding thus instituted on the informal docket is without prejudice to complainant's right to file and prosecute a formal complaint, in which event the proceeding on the informal docket will be discontinued.

§1100.25 *Informal complaints seeking damages. (rule 25)*

(a) *Actual filing required.*—Notification to the Commission that an informal complaint may or will be filed later seeking damages is not a filing within the meaning of the statute except as provided in paragraph (e) of this section.

(b) *Content.*—An informal complaint seeking damages, when permitted under the act, must be filed within the statutory period, and should contain such data as will serve to identify with reasonable definiteness the shipments or transportation services in respect of which damages are sought. Such complaint should state: (1) that complainant makes claim for damages, (2) the name of each individual seeking damages, (3) the names of defendants against which claim is made, (4) the commodities, the rate applied, the date when the charges were paid, by whom paid, and by whom borne, (5) the period of time within which or the specific dates upon which the shipments were made, and the dates when they were delivered or tendered for delivery, (6) the points of origin and destination, either specifically or, where they are numerous, by definite indication of a defined territorial or rate group of the points of origin and destination and, in known, the routes of movement, and (7) the nature and amount of the injury sustained by each claimant.

(c) *Statement of prior claim.*—If a complaint filed under paragraph (b) or (e) of this section contains a claim on any shipment which has been the subject of a previous informal or formal complaint to the Commission, reference to such complaint must be given.

(d) *Copies.*—The original of an informal complaint seeking damages must be accompanied by copies in sufficient number to enable the Commission to transmit one to each defendant named.

(e) *Special-docket proceedings.*—Where the act provides for an award of damages for violation thereof and a carrier is willing to pay them, or to waive collection of undercharges, petition for appropriate authority should be filed by the carrier on the special docket in the form prescribed by the Commission. If the petition is granted an appropriate order will be entered. Such petition, when not filed in connection with an informal complaint pending before the Commission, must be filed within the statutory period and will be deemed the equivalent of an informal complaint and an answer thereto admitting the matters stated in the petition. If a carrier is unable to file such petition within the statutory period and the claim is not already protected from the operation of the statute by informal complaint, a statement setting forth the facts may be filed by the carrier within the statutory period. Such statement will be deemed the equivalent of an informal complaint filed on behalf of the shipper or consignee and sufficient to stay the operation of the statute.

(f) *Six months' rule.*—If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission. The matter in such complaint will not be reconsidered unless, within 6 months after the date such notice is mailed, either a formal complaint as to such matter is filed, or it is informally resubmitted on an additional fact basis.

Such filing or resubmission will be deemed to relate back to the date of the original filing, but reference to that date and the Commission's file number must be made in such resubmission or in the formal complaint filed. If the matter is not so resubmitted, or included in a formal complaint, as provided in this section, complainant will be deemed to have abandoned the complaint and no complaint seeking damages based on the same cause of action will thereafter be placed on file or considered unless itself filed within the statutory period.

§1100.26 *Formal complaints; copies.*

(a) *Generally.*—The original of each formal complaint, amended or supplemental formal complaint, or cross complaint, must be accompanied by copies in sufficient number to enable the Commission to serve one upon each defendant, including each receiver or trustee, and retain six copies in addition to the original.

(b) *Provision for State authorities.*—If complaint is made under part II of the act, or respecting State-made rates (rule 30(b)), sufficient copies in addition to those required under paragraph (a) of this section shall be furnished to permit the Commission to supply one to the appropriate authority in each of the States included in the scope of the complaint.

§1100.27 *Formal complaints; joinder.*

(a) *Causes of action.*—Two or more grounds of complaint concerning the same principle, subject, or state of facts may be included in one complaint, but should separately be stated and numbered.

(b) *Complainants.*—Two or more complainants may join in one complaint if their respective causes of action are against the same defendant or defendants and concern substantially the same alleged violation of the act and a like state of facts.

(c) *Defendants.*—If complainant is made with respect to through transportation by continuous carriage or shipment, all persons subject to the act participating therein, and against which an order is sought, should be made defendants. If complaint is made of a classification or any provision thereof, ordinarily it will suffice to make defendants the persons operating one or more through routes between representative points of origin and destination.

(d) *Correct designation of parties.*—The unabbreviated names of all parties complainant and defendant must be stated correctly.

§1100.28 *Formal complaints; allegations generally.*

A formal complaint should be so drawn as fully and completely to advise the parties defendant and the Commission in what respects the provisions of the act have been or are violated or will be violated, and should set forth briefly and in plain language the facts claimed to constitute such violation. If two or more sections or subsections of the act or requirements established pursuant thereto are alleged to be violated, the facts claimed to constitute violation of one section, subsection, or requirment should stated separately from those claimed to constitute a violation of another section, subsection, or requirement whenever that can be done by reference or otherwise without undue repetition.

§1100.29 *Formal complaints; when damages sought.*

A formal complaint that includes a request for an award of damages should contain the information specified for an informal complaint seeking damages (rule 25, paragraphs (b) and (c)).

§1100.30 *Formal complaints; discrimination, preference, and prejudice.*

(a) *Generally.*—A complaint that alleges the act is violated because of an undue or unreasonable preference or advantage, undue or unreasonable prejudice or disadvantage, or unjust discrimination should specify clearly the particular elements stated in the act as constituting such violation, and the facts which complainant relies upon to establish it. Such elements may include a special rate, rebate, drawback, or other device; and a particular person, company, firm, association, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic.

(b) *State-made rates.*—A complaint that brings in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, upon the ground that it violates provisions of the act which prohibit undue or unreasonable advantage preference, or prejudice as between persons or localities in intrastate commerce and persons or localities in interstate or foreign commerce, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, should bring in issue the justness and reasonableness of the rate, fare, charge, classification, regulation, or practice applicable to the interstate or foreign commerce involved in such complaint. Such complaint should also bring in issue the question as to what should be the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice that should be established so as to remove any such advantage, preference, prejudice, or such unjust discrimination.

§1100.31 *Formal complaints; other specifications.*

(a) *Tariff or schedule references.*—The several rates, fares, charges, schedules, classifications, regulations, or practices on which complaint is made should be set out by specific reference to the tariffs or schedules in which they appear, whenever that is practicable.

(b) *States in which transportation occurs.*—A formal complaint under part II of the act should specifically name the States in and through which the transportation which gives rise to the complaint is performed.

(c) *Hearing place.*—A formal complaint should be accompanied by a statement of the place at which hearing is desired.

§1100.32 *Formal complaints; prayers for relief.*

(a) *Generally.*—A formal complaint in which relief for the future is sought should contain a detailed statement of the relief desired. Relief in the alternative or of several different types may be demanded, but the issues raised in the formal complaint should not be broader than those to which complainant's evidence is to be directed at the hearing.

(b) *Specific prayer for damages.*—Except under unusual circumstances, and for good cause shown, damages will not be awarded upon a complaint unless specifically prayed for, or upon a new complaint by or for the same complainant which is based upon any finding in the original proceeding.

§1100.33 *Amended and supplemental formal complaints.*

An amended or supplemental complaint may be tendered for filing by a complainant against a defendant or defendants named in the original complaint, stating a cause of action alleged to have accrued within the statutory period immediately preceding the date of such tender, in favor of complainant and against the defendant or defendants.

§1100.34 *Service of formal and cross complaints.*

The Commission will serve formal complaints. It will also serve supplemental, amended, and cross complaints and specific amendments to all complaints when it has granted leave to file such pleadings. Such service will be made personally upon a carrier or freight forwarder or upon an agent thereof designated for purposes of service, or by mail addressed to the carrier or freight forwarder or to the agent thereof at the address filed. If no agent has been designated, service may be made by posting in the office of the Secretary of the Commission, and if the defendant be a carrier subject to part II of the act, by also posting in the office of the Secretary or clerk of the motor carrier regulatory board of the State wherein the motor carrier maintains headquarters. If the complaint involves only the lawfulness of rates, fares, charges, classifications, or practices, service in the manner indicated in the third sentence of this section may be made upon an attorney in fact of a carrier or freight forwarder who has filed a tariff or schedule on behalf of such carrier or freight forwarder, but such service will not be made upon a carrier subject to part I of the act unless such carrier has failed to designate an agent for service in the city of Washington.

§1100.35 *Answers and cross complaints to formal complaints.*

(a) *Generally.*—An answer may simultaneously be responsive to a formal complaint and to any amendment or supplement thereof. It must be drawn so as fully and completely to advise the parties and the Commission of the nature of the defense, including, if a departure from the requirements of section 4(1) of the act is involved, the number of the particular application or order, if any, which protects such departure; and must admit or deny specifically and in detail each material allegation of the pleading answered. An answer may embrace a detailed statement of any counterproposal which a defendant may desire to submit. Unless the issue is such that separate answers are required, answer for all defendants may be filed on their behalf by one defendant in one document, in which event the answer must show clearly the names of all defendants joining therein, and their concurrence.

(b) *Cross complaints.*—A cross complaint, alleging that other persons, parties to the proceeding, have violated the act or requirements established pursuant thereto, or seeking relief against them under the act, may be tendered for filing by a defendant with its answer.

(c) *Time for filing; copies.*—Unless otherwise directed by the Commission, an answer to a complaint should be filed within 20 days after the day on which the complaint to which answer is filed was served. The original and six copies of an answer shall be filed with the Commission.

(d) *When issue joined.*—If any defendant answers or fails to file and serve answer within the period specified in paragraph (c), issue thereby is joined as to such defendant.

§1100.36 *Motions to dismiss or to make more definite and certain.*

(a) *As to complaint.*—Defendant may file with his answer, or with his statement under modified procedure, a motion that the allegations in the complaint be made more definite and certain, such motion to point out the defects complained of and details desired. Defendant may also file with his answer a motion to dismiss a complaint because of lack of legal sufficiency appearing on face of such complaint.

(b) *As to answer.*—No replication to the answer shall be filed, but any party may file, within 10 days after the filing of an answer, or, in the case of modified procedure, complainant may file with his statement in reply, a motion that the answer, or defendant's statement, as the case may be, be made more definite and certain, such motion to point out the defects complained of and the details desired.

§1100.37 *Satisfaction of complaint.*

If a defendant satisfies a formal complaint, either before or after answering, a statement to that effect signed by the opposing parties must be filed (original only need be filed), setting forth when and how the complaint has been satisfied. This action should be taken as expeditiously as possible.

§1100.38 *Applications, forms, and instructions.*

An application filed with the Commission shall be prepared in accord with and contain the information called for in the form of application, if any, prescribed by the Commission, or any instructions which may have been issued by the Commission with respect to the filing and service of an application.

§1100.39 *Applications; notice.*

Appropriate notice of the filing of an application will be given by the applicant or by the Commission to the States, to State authorities, or to other persons as may be required by the form or instruction or by the act.

§1100.40 *Protests against applications.*

(a) *Content.*—A protest against the granting of any application shall set forth specifically the grounds upon which it is made and contain a concise statement of the interest of protestant in the proceeding.

(b) *When filed.*—Any protest shall be filed within the Commission promptly after the application is filed. If the proceeding be one respecting which the Commission has issued a notice advising the public of the filing of the application, the protest shall be filed within the time specified in such notice.

(c) *Copies; service.*—A protest filed under this section shall be served upon applicant and, unless otherwise specified in the public notice, the original and six copies of the protest shall be filed with the Commission.

(d) *When rule disregarded.*—An application may be set for hearing without awaiting the filing of a protest or of a reply thereto, and also may be disposed of without regard to the prior paragraphs of this section unless the act provides that the particular application may be granted only upon hearing.

§1100.41 *Protests in valuation proceedings.*

A protest of a tentative valuation shall contain a concise statement of the essential elements of protest with particular reference to the matters in the tentative valuation concerning which protest is made and shall include a statement of the changes therein desired by prtoestant. When practicable, each object of protest should be set up as a separate item in a separately numbered paragraph. Each item of protest against land values or areas must state the valuation section and zone on the Commission's maps in which the land is located. When protestant claims that property owned or used has been omitted, a full description of such property and its location must be included in the protest.

§1100.42 *Protests against tariffs or schedules.*

(a) *Content.*—The protested tariff or schedule sought to be suspended should be identified by making reference to the name of the publishing carrier, freight forwarder, or agent, to the Interstate Commerce Commission number, and to the specific items or particular provisions protested. Reference should also be made to the tariff or schedule, and the specific provisions thereof, proposed to be superseded. The protest should state the grounds in support thereof, indicate in what respect the protested tariff or schedule is considered to be unlawful, and state what protestant offers by way of substitution. Such protests will be considered as addressed to the discretion of the Commission. Should a protestant desire to proceed further against a tariff or schedule which is not suspended, or which has been suspended and the suspension vacated, a separate later formal complaint or petition should be filed.

(b) *When filed.*—Protests against, and requests for suspension of, tariffs or schedules filed under the act will not be considered unless made in writing and filed with the Commission at Washington, D.C. Such protests and requests for suspension shall reach the Commission at least 12 days (except as provided in paragraph (c) of this section) before the effective dates of the tariffs, schedules, or parts thereof to which they refer, unless the protested publications were filed on less than 30 days notice under the authority of this Commission, in which event the protests should be filed not less than 5 days before such effective dates. In an emergency, telegraphic protests will be acceptable if received within the time limits herein specified, provided they also fully comply with paragraph (a) of this section and copies thereof are immediately telegraphed by protestants to the respondent carriers or their publishing agents. Six copies of such telegrams should immediately be mailed by the protestants to the Commission at Washington.

(c) *Motor carrier tariff bureau filings.*—When motor common carrier tariff bureaus file schedules of proposed general increases in rates and charges, or of a proposed rate restructuring, which proposals are subject to the special procedures prescribed in Ex Parte No. MC-82, *New Procedures in Motor Carrier Rev. Proc.*, 339 I.C.C. 324, and set forth in part 1104 of this subchapter, protests thereto shall reach the Commission at least 20 days before the published effective dates of those schedules. To assure consideration, replies to protests should reach the Commission not later than the seventh workday prior to the effective date of the protested schedules.

(d) *Copies; service.*—The original and six copies of each protest, except as provided in paragraph (e), or of each replied filed under this section, must be filed with the Commission, and one copy of the protest simultaneously must be served upon the publishing carrier, freight forwarder, or agent, and upon other persons known by protestants to be interested.

(e) *Passenger fare increases.*—The original only of each protest or request for investigation and suspension of increased passenger fares need be filed with the Commission.

(f) *Reply to protest.*—A reply to a protest filed under this section must reach the Commission not later than the fourth working day prior to the scheduled effective date of the protested schedules unless otherwise provided.

(g) *Special requirements for protests against revisions to rail rates and charges and replies thereto.*—(1) Protests against, and requests for suspension of, tariffs of schedules filed by rail carriers or their publishing agents that result in revisions of rates or charges shall also include a verified complaint containing specific facts showing: (a) that without suspension the protested tariffs or schedules will cause substantial injury to the complainant or the party represented by the complainant, (b) that it is likely that complainant or the party represented by the complainant will prevail on the merits pursuant to any applicable provisions of the act, and (c) Where protestants allege that a rate is unreasonably high in violation of section 1(5)b, they must submit evidence relating to market dominance as set forth at 49 CFR section 1109.1. (2) Replies to verified complaints filed under this section shall be verified.

§1100.43 *Service* of *investigation order: default where failure to comply.*

An order instituting an investigation will be served by the Commission upon respondents. If within the time period stated in that order a respondent fails to comply with any requirement specified therein, respondent shall be deemed in default and to have waived any further hearing. Thereafter, the investigation may be decided without further proceedings.

PETITIONS SEEKING INSTITUTION OF RULEMAKING PROCEEDINGS

§1100.44 *Petitions seeking institution of rulemaking proceedings.*

Any person may file a petition requesting the Commission to institute a proceeding for the purpose of issuing statements, rules, or regulations of general applicability and significance designed to implement or interpret law, or to formulate general policy for future effect. No reply to such a petition may be filed. Whether a proceeding shall be instituted as requested is within the discretion of the Commission and the ruling on the petition will be final. In the event a rulemaking proceeding is instituted by the Commission, the procedure to be employed for the taking of evidence or the receipt of views and comments will be designated by Commission order.

§1100.45 *Modified procedure, how initiated.*

(a) *Commission's initiative or by request.*—Modified procedure (see rule 5(j)) will be ordered in a proceeding upon the Commission's initiative or upon its approval of a request filed by any party that the modified procedure shall be observed.

(b) *Order directing modified procedure.*—An order directing modified procedure will list the names and addresses of the persons who at that time are parties to the proceeding, and direct that they comply with the modified procedure rules. As used in rules 49, 51, and 53 the term "complainant" shall comprehend the party having the initial duty to establish the truth of the claim or to justify the relief or authorization sought, and the term "defendant" shall comprehend the party controverting the truth of the claim or opposing the relief or authorization sought.

§1100.46 *Modified procedure; effect of order.*

(a) *Relief from answer rule.*—Issuance of an order directing modified procedure shall relieve defendant from the obligation of answering as provided in rule 35.

(b) *Default where failure to comply.*—If within any time period provided in the modified procedure rules a party fails to file a pleading required by those rules, or otherwise fails to comply therewith, such party shall be deemed to be in default and to have waived any further hearing. Thereafter the proceeding may be disposed of without further notice to the defaulting party, and without other formal proceedings as to such party.

§1100.47 *Modified procedure; intervention.*

Persons permitted to intervene under modified procedure shall file and serve pleadings in conformity with the provisions relating to the parties in whose behalf they intervene.

§1100.48 *Modified procedure; joint pleadings.*

Parties having common interests, to the extent practicable, shall arrange for joint preparation of pleading filed under modified procedure.

§1100.49 *Modified procedure; content of pleadings.*

(a) *Generally.*—A statement filed under the modified procedure after that procedure has been directed shall state separately the facts and arguments and include the exhibits upon which the party relies. Only facts contained in the verified statement of facts can be used in argument. If, pursuant to rule 56(a), no answer has been filed, defendant's statement must admit or deny specifically and in detail each material allegation of the complaint. In addition defendant's statement in reply shall: specify those statements of fact and arguments of the opposite party to which exception is taken, and include a statement of the facts and arguments in support of such exception. Complainant's statement of reply shall be confined to rebuttal of the defendant's statement.

(b) *Exhibit identification.*—An exhibit which is part of any pleading filed under modified procedure shall serially be numbered and bear the notation, properly filled out, in the upper right-hand corner: "Complainant (Defendant)——————— Exhibit No.——————Witness——————."

(c) *Damages.*—If an award of damages is sought the paid freight bills or properly certified copies thereof should accompany the original of complainant's statement when there are not more than 10 shipments, but otherwise the documents should be retained.

§1100.50 *Modified procedure; verification.*

The facts asserted in any pleading filed under modified procedure must be sworn to by persons having knowledge thereof, which latter fact must affirmatively appear in the affidavit. Except under unusual circumstances, such persons should be those who would appear as witnesses orally to substantiate the facts asserted should hearing become necessary. The original of any pleading filed under modified procedure must show the signature, capacity, and impression seal, if any, of the person administering the oath, and the date thereof.

§1100.51 *Modified procedure; when pleadings filed and served.*

Within 20 days from the date of service of an order requiring modified procedure, complainant shall serve upon the other parties a statement of all the evidence upon which it relies. Within 30 days thereafter defendant shall serve its statement. Within 20 days thereafter complainant shall serve its statement in reply. No further reply may be made by any party except by permission of the Commission.

§1100.52 *Modified procedure; copies of pleadings.*

Except as otherwise provided in rule 247, the original and six copies of any statement made pursuant to rule 51 shall be filed with the Commission. Subsequent pleadings are subject to rule 54.

§1100.53 *Modified procedure; hearings.*

(a) *Request for cross-examination or other hearing.*—If cross-examination of any witness is desired the name of the witness and the subject matter of the desired cross-examination shall, together with any other request for oral hearing, including the basis therefor, be stated at the end of defendant's statement or complainant's statement in reply as the case may be. Unless material facts are in dispute, oral hearing will not be held for the sole purpose of cross-examination.

(b) *Hearing issues limited.*—The order setting the proceeding for oral hearing, if hearing is deemed necessary, will specify the matters upon which the parties are not in agreement and respecting which oral evidence is to be introduced.

§1100.54 *Modified procedure; subsequent procedure.*

Procedure subsequent to that provided in the modified procedure rules shall be the same as that in proceedings not handled under modified procedure.

§1100.55 *Notice of hearing.*

(a) *Assignment; service and posting of notice; electronically recorded transcript.*—In those proceedings in which an oral hearing is to be held, the Commission will, by order or otherwise, assign a time and place for hearing. Such action will include notice when the transcript is to be made by electronic recording. Notice of such hearing will be posted in the Office of the Secretary of the Commission and will be served upon the parties and such other persons as may be entitled to receive notice under the act.

(b) *Requests for changes in assignment.*—Requests for postponements of date of hearing will be granted only for good and sufficient cause. After notice of the use of electronic recording, any request for stenographic transcript by the Commission's official reporter in lieu thereof must be made in writing to the Secretary of the Commission not less than 20 days prior to the date of the hearing. Such request will contain a statement that the requestor will provide the Commission with the original and one copy of such stenographic transcript at his own expense in accordance with the schedule of charges in the official reporting contract. In the event a request is made for a written transcript of an electronic recorded proceeding at a later date, the requestor will furnish at no expense to the Commission, an original and one copy of such written transcript for the Commission's use, in accordance with the schedule of charges in the official reporting contract.

(c) *Service of notice of assignment change.*—The Commission may confine the service of notice of a change of time or place assigned for hearing (other than by publication or posting), or of any adjourned, further, or supplemental hearing to those only who have indicated to the Commission a desire to be notified, at their own expense if telegraphic advice becomes necessary, of any such change.

§1100.56 *Subpena.*

(a) *Requests; particularity.*—Unless directed by the Commission upon its own motion, a subpena to compel a witness to produce documentary evidence will be issued only upon petition showing general relevance and reasonable scope of the evidence sought, which petition must also specify with particularity the books, papers, or documents desired, and the facts expected to be proved thereby; Provided, however, That for good cause shown, in lieu of a petition, the request for such a subpena may be made orally upon the record to the officer presiding at the hearing. A request for issuance of a subpena other than to compel the production of documentary evidence may be made either by letter (original only need be filed with the Commission) or orally upon the record to the officer presiding at the hearing. A showing of general relevance and reasonable scope of the evidence sought may be required and the subpena will be issued or denied accordingly.

(b) *Issuance.*—A subpena may be issued by the Commission or by the officer presiding at the hearing, but only under the signature of the Secretary or of a member of the Commission.

(c) *Service.*—The original subpena shall be exhibited to the person served, shall be read to him if he is unable to read, and a copy thereof shall be delivered to him by the officer or person making service.

(d) *Return.*—If service of subpena is made by a United States marshal or his deputy, such service shall be evidenced by his return thereon. If made by any other person, such person shall make affidavit thereof, stating the date, time, and manner of service; and return such affidavit on, or with, the original subpena in accordance with the form thereon. In case of failure to make service the reasons for the failure shall be stated on the original subpena. The written acceptance of service of a subpena by the person named therein shall be sufficient without other evidence of return. The original subpena bearing or accompanied by the required return, affidavit, statement, or acceptance of service, shall be returned forthwith to the Secretary of the Commission, or, if so directed on the subpena, to the officer presiding at the hearing at which the person subpened is required to appear.

(e) *Witness fees.*—A witness who is summoned and responds thereto is entitled to the same fee as is paid for like service in the courts of the United States. Such fee is to be paid by the party at whose instance the testimony is taken at the time the subpena is served, except that when the subpena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered at the time of service.

§1100.57 *Discovery*

(a) *In general.*—Unless otherwise available under the Interstate Commerce Act or other applicable statutes, parties may obtain discovery pursuant to these rules (rules 57-67, inclusive) regarding any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding (other than those informal proceedings specified in rules 24, 25, 200, and 225, and proceedings that need not be determined on a record after hearing) provided that, discovery procedures (except for written interrogatories and requests for admissions in proceedings other than those arising under rule 247) may be used only when the Commission, upon its own motion, or upon a verified petition filed by a party, and upon good cause shown, shall have entered an order approving such use. Such petitions, where required, must be filed in sufficient time to allow for the filing of replies and for consideration by the Commission without requiring the postponement of any established date for hearing or for submission of initial statements under modified procedure. Likewise, the use of discovery in those circumstances in which no petition is required must be accomplished without requiring the postponement of any established date for hearing or for submission of initial statements under modified procedure. It is not ground for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) *Definition.*—The term "Commission," as used in these discovery rules (rules 57-67, inclusive), means the Interstate Commerce Commission, division, Commissioner, or presiding officer.

(c) *Protective conditions.*—Upon motion by any party, by the person from whom discovery is sought, or by any person with a reasonable interest in the date, information, or material sought to be discovered, and for good cause shown, any order which justice requires may be entered to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding. Relief through a protective order may include one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time and place; (3) that the discovery may be had only upon such terms and conditions as the Commission may impose to insure financial responsibility in indemnifying the party or person against whom discovery is sought to cover the reasonable expenses incurred; (4) that the discovery may be had only by a method other than that selected by the party seeking discovery; (5) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (6) that discovery be conducted with no one present except persons designated in the protective order; (7) that a deposition after being sealed be opened only by order of the Commission; (8) that a trade secret or other confidential research development, or commercial information not be disclosed or be disclosed only in a designated way; and (9) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened only upon direction or order of the Commission. If the motion for a protective order is denied in whole or in part, the Commission may, on such terms and conditions as it deems just, enter an order requiring any party or person to provide or permit discovery. A protective order under this paragraph may only be sought after, or in conjunction with, an effort by any party to obtain relief under rules 60(d), 62(a) or 67.

(d) *Sequence and timing of discovery.*—Unless the Commission upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Stipulations regarding discovery.*—Unless otherwise ordered, a written stipulation entered into by all the parties and filed with the Commission may (1) provide that depositions be taken before any person, at any time or place, upon sufficient notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

§1100.58 *Deposition*

(a) *Purpose.*—Subject to the proviso in rule 57(a), the testimony of any person, including a party, may be taken by deposition upon oral examination.

(b) *Petitions.*—The petition filed under rule 57(a) requesting an order to take a deposition and perpetuate testimony or to produce documents and materials (1) shall set forth the facts it desires to establish and the substance it expects to elicit; (2) shall be served upon all parties to the proceeding and upon the person sought to be deposed and/or the custodian of the documents or materials sought to be produced; (3) shall set forth the name and address of the witness, the place where, the time when, the name and office of the officer before whom, and the cause or reason why such deposition should be taken; and (4) shall specify with particularity the documents and materials which the deponent is requested to produce.

(c) *Order.*—If the Cmmission is convinced on its own initiative or by the petition requesting an order to take a deposition that the deposition will prevent a failure or delay of justice, it will serve an order upon the parties and the witness, naming the witness whose deposition is to be taken, specifying the time when, the place where, and the officer before whom the deposition is to be taken, and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The provisions for the taking of the deposition specified in the Commission's order may or may not be the same as requested in the petition. The deposition may then be taken in accordance with these rules, and the Commission may make orders of the character provided by rule 67.

§1100.59 *Depositions, location, officer, time, fees, absence, disqualification.*

(a) *Where deposition shall be taken.*—Unless otherwise ordered or agreed to by stipulation, depositions shall be taken in the city or municipality where the deponent is located.

(b) *Officer before whom taken.*—Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Within a foreign country, depositions may be taken before an officer or person designated by the Commission or agreed upon by the parties by stipulation in writing to be filed with the Commission.

(c) *Fees.*—A witness whose deposition is taken pursuant to these rules and the officer taking same, unless he be employed by the Commission , shall be entitled to the same fee paid for like service in the courts of the United States, which fee shall be paid by the party at whose instance the deposition is taken.

(d) *Failure to attend or to serve subpena expenses.*—(1) If the party who filed a petition pursuant to rule 58(b) fails to attend and proceed with the taking of the deposition and another party attends in person or by representative pursuant to an order entered under rule 58(c), the Commission may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(2) If the party who filed a petition pursuant to rule 58(b) fails to serve a subpena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by representative because he expects the deposition of the witness to be taken, the Commission may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(e) *Disqualification for interest.*—No deposition shall be taken before a person who is a relative or employee or representative or counsel of any of the parties, or is a relative or employee of such representative or counsel or is financially interested in the proceeding.

§1100.60 *Depositions, procedures.*

(a) *Examination.*—Examination and cross-examination of witnesses shall proceed as permitted at a hearing and shall be limited to the subject matter specified in the order under Rule 58(c). All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and he shall transmit them to the officer, who shall open the sealed envelope, propound the questions to the witness, and record the answers verbatim.

(b) *Use of depositions.*—At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation, partnership, association or Governmental agency (other than this Commission, except in those instances where the Commission itself is a party to the proceeding) which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer or Commission finds: (i) that the witness is dead; or (ii) that the witness is at a greater distance than 100 miles from the place of hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at public hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. Substitution of parties does not affect the right to use depositions previously taken.

(c) *Effect of taking or using depositions.*—A party shall not be deemed to make a person his own witness for any prupose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall *not* apply to the use by an adverse party of a deposition under paragraph (b)(2) of this rule . At the hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) *Motions to protect.*—At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the Commission may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in *rule 57(c).* If the order made terminates the examination, it shall be resumed thereafter only if so ordered. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(e) *Recordation.*—The officer before whom the deposition is to be taken shall observe the provisions of rules 15 and respecting appearances and typographical specifications, shall put the witness on oath, and shall personally, or by someone acting under his direction and in his presence, record and transcribe the testimony of the witness as required by these rules.

(f) *Signing.*—When the testimony is fully transcribed or otherwise recorded, the deposition shall be submitted to the witness for examination and shall be read to or by him unless such examination and reading are waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 15 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used fully as though signed, unless, on a motion to suppress, it is found that the reasons given for refusal to sign require rejection of the deposition in whole or in part.

(g) *Attestation.*—The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that the officer is not a relative or employee or representative or counsel of any of the parties, or is a relative or employee of such representative or counsel, or is financially interested in the proceeding.

(h) *Return.*—The officer shall securely seal the deposition in an envelope indorsed with sufficient information to identify the proceeding and marked "Deposition of (here insert name of witness)" and shall promptly send the original and one copy of all exhibits, by registered mail to the Secretary of the Commission. A deposition to be offered in evidence must reach the Commission not later than 5 days before the date it is to be so offered.

(i) *Notice.*—The party taking the deposition shall give prompt notice of its filing to all other parties.

(j) *Copies.*—Upon payment of reasonable charges therefor, the officer before whom the deposition is taken shall furnish a copy of it to any interested party or to the deponent.

§1100.61 *Effect of errors and irregularities in depositions.*

(a) *As to disqualification of officer.*—Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(b) *As to taking of deposition.*—(1) Objection to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(c) *As to completion and return of deposition.*—Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under rules 59 and 60 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

§1100.62 *Written interrogatories to parties.*

(a) *Availability; procedures for use.—Subject to the proviso in rule 57(a),* any party may serve upon any other party written interrogatories to be answered by the party served, or if the party served is a public or private corporation, partnership, association, or governmental agency (other than this Commission, except in those instances where the Commission itself is a party to the proceeding), by any officer or agent, who shall furnish such information as is available to the party. Copies of any interrogatories served shall also be filed with the Commission. Each interrogatory shall be answered separately and fully in writing, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer. The answers are to be signed by the person making them and subscribed by an appropriate verification generally in the form prescribed in No. 6 of appendix B to these rules. Objections are to be signed by the representative or counsel making them. The person upon whom the interrogatories have been served shall serve a copy of the answers and objections within the time period designated by the party submitting the interrogatories, but not less than 15 days after the service thereof.

(b) *Option to produce business records.*—Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies thereof, or compilations, abstracts, or summaries therefrom. If information sought is contained in computer runs, punchcards, or tapes which also contain privileged or proprietary information or information the disclosure of which is proscribed by the act, it shall be sufficient response under these rules that the person upon whom the interrogatory has been served is willing to make available to and permit an independent professional organization not interested in the proceeding and paid by the party serving the interrogatory to extract from such runs, punchcards, or tapes the information sought in the interrogatory that is not privileged or proprietary information or information the disclosure of which is proscribed by the act.

(c) *Service of interrogatories in those proceedings not requiring a petition pursuant to rule 57(c).*—In those proceedings not requiring a petition for interrogatories pursuant to rule 57(a) and unless under specical circumstances and for good cause shown, no written interrogatories shall be served within 20 days prior to the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure, and when the written interrogatories are to be served in a foreign country, they shall not be served within 40 days prior to such date.

§1100.63 *Request for admission.*

(a) *Availability; procedures for use.—Subject to the proviso in rule 57(a),* a party may serve upon any other party a written request for the admission, for purposes of the pending proceeding only, of the truth of any matters within the scope of rule 57(a) set forth in the request, including the genuineness of any documents described in the request for admission. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Copies of any requests for admission served shall also be filed with the Commission. Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than 15 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or his representative or counsel. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for hearing may not on that ground alone, object to the request; he may, subject to the provisions of rule 67(c), deny the matter or set forth reasons why he cannot admit or deny it. Copies of any answers or objections shall be filed with the Commission.

(b) *Effect of admission.*—Any matter admitted under this rule is conclusively established unless upon petition and a showing of good cause the Commission enters an order permitting withdrawal or amendment of the admission. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(c) *Service of written requests for admission in those proceedings not requiring a petition pursuant to rule 57(c).*—In those proceedings not requiring a petition for requests for admission pursuant to rule 57(a), and unless under special circumstances and for good cause shown, no requests for admission shall be served within 20 days prior to the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure, and when requests for admission are to be served in a foreign country they shall not be served within 40 days prior to such date.

§1100.64 *Depositions, requests for admission, written interrogatories, and responses thereto: inclusion in record.*

At the oral hearing, or upon the submission of statements under the modified procedure, depositions, requests for admission and written interrogatories, and respective responses, may be offered in evidence by the party at whose instance they were taken. If not offered by such party, they may be offered in whole or in part by any other party. If only part of a deposition, request for admission or written interrogatory, or response thereto is offered in evidence by a party, any other party (where the matter is being heard orally) may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts. Such depositions, requests for admission and written interrogatories, and responses thereto shall be admissible in evidence subject to such objections as to competency of the witness, or competency, relevancy, or materiality of the testimony as were noted at the time of their taking or are made at the time they are offered in evidence.

§1100.65 *Supplementation of responses.*

A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement his response to include information thereafter acquired in the following instances:

(a) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify, and the substance of his testimony.

(b) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct his response.

(c) A duty to supplement responses may be imposed by order, agreement of the parties, or at any time prior to the hearing or the submission of verified statements under the modified procedure through new requests for supplementation of prior responses.

§1100.66 *Production of documents and things and entry upon land for inspection and other purposes.*

(a) *Scope.*—Subject to the proviso in rule 57(a), any party may be ordered and directed (1) to produce and permit the petitioning party to inspect any designated documents (including writings, drawings, graphs, charts, photographs, phonograph records, tapes, and other data compilations from which information can be obtained, translated, if necessary, with or without the use of detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 57(a) and which are in the possession, custody, or control of the party upon whom the order is served, but if the writings or data compilations (including computer runs, punchcards, and tapes) include privileged or proprietary information or information the disclosure of which is proscribed be the act, such writings or data compilations need not be produced under this rule but may be provided pursuant to rule 62(b); or (2) to permit, subject to appropriate liability releases and safety and operating considerations, entry upon designated land or other property in the possession or control of the party upon whom the order is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 57(a).

(b) *Procedure.*—Any petition filed pursuant to this rule shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The petition shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

§1100.67 *Failure to respond to discovery.*

(a) *Failure to answer.*—If a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under rule 60(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to rule 62(a), the party seeking discovery may apply for an order compelling an answer, by motion filed with the Commission and served on all parties and deponents. Such motion to compel an answer must be filed with the Commission within 10 days after the failure to obtain a responsive answer upon desposition, or within 10 days after expiration of the period allowed for submission of answers to interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(b) *Failure to comply with order.*—(1) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the Commission, such refusal may subject the refusing party or person to action by the Commission under sections 12(3) and 12(4) of the act to compel appearance and compliance with the Commission's order.

(2) If any party or an officer, director, managing agent, or employee of a party or person refuses to obey an order made under paragraph (a) of this section requiring him to answer designated questions, or an order made under rule 66 requiring him to produce any document or other things for inspection, copying, testing, sampling, or photographing or to permit it to be done, or to permit entry upon land or other property, the Commission may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated facts shall be taken to be established for the purposes of the proceeding in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the proceeding or any part thereof.

(c) *Expenses on refusal to admit.*—If a party, after being served with a request under rule 63 to admit the genuineness of any document or the truth of any matter of fact, serves a sworn denial thereof, and if the party requesting the admission thereafter proves the genuineness of any such document or the truth of any such matter of fact, the Commission may order the party making such denial to pay to such other party the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

(d) *Failure of party to attend or serve answers.*—If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under rule 62, after proper service of such interrogatories, the Commission on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof.

(e) *Expenses against United States.*—Expenses and attorney's fees are not to be imposed upon the United States under this rule.

HEARINGS

§1100.68 *Prehearing conferences.*

(a) *Purposes.*—Upon written notice by the Commission in any proceeding, or upon written or oral instruction of an officer, parties or their attorneys may be directed to appear before an officer at a specified time and place for a conference, prior to or during the course of hearing, or in lieu of personally appearing, to submit suggestions in writing, for the purpose of formulating issues and considering:

(1) The simplication of issues;

(2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;

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(3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by any or all parties of matters of public record, such as annual reports and the like, to the end of avoiding the unnecessary introduction of proof;

(4) The procedure at the hearing;

(5) The limitation of the number of witnesses;

(6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and

(7) Such other matters, including disposition of requests for discovery, as may aid in the simplification of the evidence and disposition of the proceeding.

Parties may request prehearing conference.

(b) *Facts disclosed privileged.*—Facts disclosed in the course of the prehearing conference are privileged and, except by agreement, shall not be used against participating parties either before the Commission or elsewhere unless fully substantiated by other evidence.

(c) *Recordation and order.*—Action taken at the conference, including a recitation of the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered and defining the issues, shall be recorded in an appropriate order, unless the parties enter upon a written stipulation as to such matters, or agree to a statement thereof made on the record by the officer.

(d) *Objection to the order; subsequent proceedings.*—If an order is entered a reasonable time shall be allowed to the parties to present objections on the ground that it does not fully or correctly embody the agreements reached at such conference. Thereafter the terms of the said order or modification thereof, the written stipulation, or statement of the officer, as the case may be, shall determine the subsequent course of the proceedings, unless modified to prevent manifest injustice.

§1100.69 *Stipulations.*

Apart from the procedure contemplated by the prehearing provisions (rule 68), and upon permission granted, the parties may in the discretion of the officer, by stipulation in writing filed with the Commission at any stage of the proceeding, or orally made at the hearing, agree upon any pertinent facts in the proceeding. It is desired that the facts be thus agreed upon so far as and whenever practicable.

§1100.70 *Authority of officers.*

(a) An officer may grant leave to amend or to file any pleadings, or to intervene, upon request tendered at the hearing, but in no event shall an officer grant leave to amend if thereby the issues would be so changes as to make a referred matter one which should properly be referred to a different officer. An officer shall have power to decide any motion to dismiss the proceeding or other motion which involves final determination of the merits of the proceeding. The officer shall regulate the procedure in the hearing before him, and shall have authority to take all measures necessary or proper for the efficient performance of the duties assigned him, including the authority to hold hearings, to administer oaths and affirmations, to examine witnesses, to issue subpenas at the hearing and (subject to the proviso of rule 57(a)) dispose of requests for discovery, to hold conferences for the settlement and simplification of issues, to rule on motions and dispose of procedural requests, to make initial decisions, and to take any other action authorized by this part, by the Administrative Procedure Act, or by the Interstate Commerce Act and related acts. Any proceedings in which an oral hearing is held and in which the officer can announce his decision either (1) on the record after the close of the taking of testimony and the hearing of arguments by the officer, or (2) by appropriate notification to the parties after the close of hearing may be made the subject of an initial decision prepared by a party or parties in whose favor the officer decides, within a period specified by the officer, and subject to such changes as the officer considers appropriate in the draft prepared for him.

(b) At any oral hearing conducted before the Commission, an Administrative Law Judge or joint board, at which an official record of the proceeding is made, the recording of the hearing by means of live or delayed television, radio, or the use of a tape recorder or other electronic or photgraphic equipment by an person other than the official reporter will not be permitted without special permission of the Chairman of the Commission.

§1100.71 *Appearances; standard of conduct; absence from hearing.*

(a) *Who may appear.*—Any individual may appear for himself and any member of a partnership which is a party to any proceeding may appear for such partnership upon adequate identification. A bona fide officer or a full-time employee of a corporation, association, or of an individual may appear for such corporation, association, or individual by permission of the officer presiding at the hearing. A party also may be represented by a practitioner.

(b) *Appearances.*—An appearance may be either general, that is, without reservation, or it may be special, that is, confined to a particular issue or question. When a practitioner enters an appearance at a hearing he will be expected to represent his client faithfully until the completion of the proceeding in which he has been retained, or until the completion of the part of the proceeding for which he has specially appeared. A practitioner who has entered his appearance at the hearing shall not be permitted to withdraw from the hearing, or wilfully to absent himself therefrom, except for good cause and, wherever practicable, only with the permission of the presiding officer. If a person desires to appear specially, he must expressly so state when he enters his appearance and at that time he shall also state the questions or issues to which he is confining his appearance; otherwise, his appearance will be considered as general.

(c) *Stanard of conduct.*—Contemptuous conduct by an person appearing at a hearing shall be ground for his exclusion by the presiding officer from the hearing.

(d) *Absence from hearing.*—If a party or the person representing him shall, after entering an appearance, attempt to withdraw from the hearing in a manner other than that specified in paragraph (b) of this section, the Commission on its own motion, or on motion of any party to the proceeding, may take such action as, in the interest of justice and the protection of the lawful rights of all parties to the proceeding, the circumstances of the case may warrant, including the striking out of all or any part of any pleading of the offending party, and including the possible dismissal of the action or proceeding, or any part thereof, the entry of an order of default against that party, or the disciplining of the practitioner concerned.

§1100.72 *Intervention; petitions.*

(a) *Content generally.*—A petition for leave to intervene must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. If the proceeding be by formal complaint and affirmative relief is sought by petitioner, the petition should conform to the requirements for a formal complaint.

(b) *When filed.*—A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after except for good cause shown.

(c) *Broadening issues; filing.*—If the petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in season to permit service upon and answer by the parties in advance of the hearing.

(d) *Copies; service; replies.*—When tendered at the hearing, sufficient copies of a petition for leave to intervene must be provided for distribution as motion papers to the parties represented at the hearing. If leave be granted at the hearing, one additional copy must be furnished for the use of the Commission. When a petition for leave to intervene is not tendered at the hearing, the original and three copies of the petition shall be submitted to the Commission together with a certificate that service in accordance with rule 22 has been made by petitioner. Any reply in opposition to a petition for leave to intervene not tendered at the hearing must be filed within 20 days after service. In the discretion of the Commission leave to intervene may be granted or denied before the expiration of the time allowed for replies.

(e) *Disposition.*—Leave will not be granted except for averments reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner thereby becomes an intervener and a party to the proceeding.

§1100.73 *Participation without intervention.*

In an investigation proceeding, or in a proceeding under section 1(a), of the act, and in a proceeding of any one of the characters herein enumerated when heard on a consolidated record with a complaint proceeding, but in no other proceeding, an appearance may be entered at the oral hearing, or in any proceeding in which the justness or reasonableness of any rate, rule, charge, or other provision of a tariff is at issue and the Commission has ordered that the proceeding be heard under modified procedure, without filing a petition in intervention or other pleading, if no affirmative relief is sought, if there is full disclosure of the identity of the person or persons in whose behalf the appearance is to be entered, if the interest of such person in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed. A person in whose behalf an appearance is entered in this manner becomes a party to the proceeding.

§1100.74 *Witness examination; order procedure.*

Witnesses will be orally examined under oath before the officer unless their testimony is taken by deposition or the facts are presented to the Commission in the manner provided under modified procedure. In formal-complaint, application, and investigation proceedings complainant, applicant, and respondent, respectively, shall open and close at the hearing, except at further hearing granted on petition the petitioner requesting further hearing shall open and close; and except, further, that parties other than the respondent shall open and close in investigations in which the burden of proof is not upon the respondent. Interveners shall follow the party in whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer, who also shall designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record.

§1100.75 *Evidence; admissibility generally.*

Any evidence which would be admissible under the general statute of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, shall be admissible in hearings before the Commission. The rules of evidence shall be applied in any proceeding to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

§1100.76 *Evidence; cumulative restriction.*

It shall be the duty of the officer before whom any proceeding is being heard to limit the number of witnesses whose testimony may be merely cumulative. And in order to enforce this section, the officer may require a clear statement on the record of the nature of the testimony to be given by any witness proffered.

§1100.77 *Evidence; prepared statements.*

With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expressions of his opinion prepared by him, or written answers to interrogatories of counsel, or a parepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement shall not include argument that before any such statement is read, or admitted in evidence the witness shall deliver to the officer, the reporter, and to opposing counsel as may be directed by the officer, a copy of such statement or of such interrogatories and his written answers thereto; and that the admissibility of the evidence contained in such statement shall be subject to the same rules as if such testimony were produced in the usual manner, including the right of cross-examination of the witness. Such approval ordinarily will be denied when in the opinion of the officer the memory or demeanor of the witness may be of importance.

§1100.78 *Evidence; official records.*

An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office containing such record or entry. This section does not prevent the proof of official records or of entry or lack of entry therein or official notice thereof by a method authorized by any applicable statute or by the rules of evidence.

§1100.79 ***Evidence; entries in regular course of business.***

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it shall appear that it was made in the regular course of business, and that it was the regular course of business to make such memorandum or record at the time such record was made, or within a reasonable time thereafter.

§1100.80 ***Evidence; documents containing matter not material.***

When material and relevant matter offered in evidence is in a document containing other matter not material or relevant, the offering party shall produce the document at the hearing, shall plainly designate the matter so offered, and shall accord to the officer and to participating counsel an opportunity to inspect it. Unless it is desired to read such matter into the record, and the officer so directs, true copies in proper form of the material and relevant matter taken from the document may be received as an exhibit, but other parties shall be afforded an opportunity to introduce in evidence, in like manner, other portions of such document if found to be material and relevant. The document itself will not be received.

§1100.81 ***Evidence; documents in Commission's files.***

(a) ***In general.***—if any matter contained in a report or other document, not a tariff or schedule, open to public inspection in the files of the Commission is offered in evidence such report or other document need not be produced but in other respects the provisions of rule 80 will apply.

(b) ***Tariffs and schedules; official notice in investigation proceedings.***—If any matter contained in a tariff or schedule on file with the Commission is offered in evidence, such tariff or schedule need not be produced or marked for identification, but the matter so offered shall be specified with particularity in such manner as to be readily identified and may be received in evidence subject to check by reference to the original tariff or schedule. Official notice will be taken without offer or production of that portion of any tariff or schedule which is the subject matter of an order of investigation and suspension.

§1100.82 ***Evidence; records in other Commission proceedings.***

If any portion of the record before the Commission in any proceeding other than the one on hearing is offered in evidence a true copy of such portion shall be presented for the record in the form of an exhibit unless:

(a) The party offering the same agrees to supply such copy later at his own expense, if and when required by the Commission; and

(b) The portion is specified with particularity in such manner as to be readily identified; and

(c) The parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference, and that any other portion offered by any other party may be incorporated by like reference subject to paragraphs (a) and (b) of this section; and

(d) The officer directs such incorporation. Any such portion so offered, whether in the form of an exhibit or by reference, shall be subject to objection.

§1100.83 ***Evidence; abstracts of documents.***

When documents, such as freight bills or bills of lading, are numerous, the officer may refuse to receive in evidence other than a limited number of such documents said to be typical. Instead he may instruct, if the proffer be for the purpose of providing damage, that introduction be deferred until there is opportunity to comply with rule 100. If the proffer be for other purpose the officer may require the party in orderly fashion to abstract the relevant data from the documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and thereupon offer such abstract in evidence in exhibit form.

§1100.84 *Evidence; exhibits.*

(a) *Generally.*—Exhibits of a documentary character may have a maximum width of 22 inches by 12 1/2 inches in height. Whenever practicable the sheets of each exhibit and the lines of each sheet should be numbered. If the exhibit consists of five or more sheets the first sheet or title-page should be confined to a brief statement of what the exhibit purports to show, with reference by sheet and line to illustrative or typical examples contained therein. The exhibit should bear an identifying number, letter, or short title which will readily distinguish it from other exhibits offered by the same party. It is desirable that, whenever practicable, rate comparisons and other evidence should be condensed into tables. Whenever practicable, especially in proceedings in which it is likely that many documents will be offered, all the documents produced by a single witness should be assembled and bound together, suitably arranged and indixed, so that they may be identified and offered as one exhibit. Exhibits should not be argumentative and should be limited to statements of fact, and be relevant and material to the issue, which can better be shown in that form than by oral testimony.

(b) *Reference to tariff authority, routes, and distances.*—All exhibits showing rates, fares, charges, or other tariff or schedule provisions must, by appropriate Interstate Commerce Commission number reference, indicate the tariff or schedule authority therefor, and if distances are shown must also show the authority therefor and, by lines, highways, or waterways, and junction points, the routes over which the distances are computed; except that the routes over which the distances are computed need not be shown when such distances are specifically published in a tariff or schedule lawfully on file with the Commission, or definitely ascertainable from a tariff or schedule on file with the Commission showing rates prescribed by the Commission and based on short-line distances, or short-highway distances, provided the exhibit makes specific reference to such tariff or schedules as provided by this section.

(c) *Copies.*—Unless the officer shall otherwise direct the original and one copy of each exhibit of a documentary character shall be furnished for the use of the Commission—original to be delivered to the reporter, and the copy to the officer. If the hearing be before a board, a copy of the exhibit shall be furnished to each member of the board, unless the board otherwise directs. Unless the officer for cause directs otherwise, a reasonable number of copies shall be furnished to counsel in attendance at the hearing. Unless the officer shall otherwise direct, in proceedings under the uniform Bankruptcy Act, the original and three copies of every exhibit of a documentary character shall be furnished for use of the Commission—original to be delivered to the reporter, and the three copies to the officer.

d. *Interchange prior to hearing.* Whenever practible, the parties should interchange copies of exhibit or other pertinent material or matter before or at the commencement of the hearing; and the Commerce or presiding officer may so direct.

(e) *When excluded how treated.* In case an exhibit has been identified, objected to, and excluded, the officer will develop whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to him. If the excluded exhibit is not withdrawn it should be given an exhibit number for identification and be incorporated in the record. Exhibit numbers once used for identification will not be duplicated thereafter.

§1100.85 *Record in referred matter unaffected by a second reference.*

If for any reason an order referring a matter to a particular officer is vacated and the matter referred to a different officer, any testimony already taken in such proceeding shall be part of the record along with any testimony which thereafter may be taken.

§1100.86 *Evidence; filing of subsequent to hearing; copies.*

Except as provided below or as expressly may be permitted in a particular instance, the Commission will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, and may return any such documents to the sender. Before the close of a hearing the officer may, at the request of a party or upon his own motion, or upon agreement of the parties, require that a party furnish additional documentary evidence supplementary to the existing record, within a stated period of time. Documentary evidence thus to be furnished will be given an exhibit number at the time of filing and the parties accordingly advised. Unless otherwise directed by the officer, the original and one copy of such submission shall be filed with the Commission.

§1100.87 *Ruling of an Officer at Hearing; Objection to.*

Formal exception to a fuling of an officer at a hearing it unnecessary. It is sufficient that a party, at the time the ruling is made or sought, make known to the officer on the record the action which he desires the officer to take or his objection to the action of the officer and his grounds therefor. An objection not pressed in brief will be considered as waived. Where no brief is filed an objection will be considered as waived if not pressed in exceptions or reply to exceptions, if filed, or in a separate petition dealing only with that objection. Rulings of the presiding officer at the hearing may not be appealed prior to service of the initial decision except where such ruling (a) may result in substantial detriment to the public interest or undue prejudice to any party, and the presiding officer so finds, (b) denies or terminates any person's participation, (c) grants a request for the inspection of documents not ordinarily available for public inspection, (d) overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents, or (e) for some other reason might, in the opinion of the presiding officer, result in substantial irreparable harm.

§1100.88 *Oral argument before the hearing officer.*

At the discretion of the hearing officer and upon reasonable notice to the parties oral argument may be made at the close of testimony before him as an alternative to the filing of written briefs. Such argument, which should include requested findings and conclusions, will be recorded and made a part of the transcript of testimony, and will be available to the Commission for consideration in deciding the case. The making of such argument shall not operate to preclude oral argument before the Commission pursuant to rule 98.

§1100.89 *Continuance for further hearing.*

A continuance may be granted by the presiding officer if it is impossible to conclude a hearing within the time available, or for any reason a continuance is necessary or advisable, but a joint board shall not set a date and place for a continued hearing without first consulting the Commission. If consultation with the Commission is impracticable the hearing shall be adjourned by the joint board to such time and place as the Commission subsequently shall determine.

§1100.90 *Transcript of Record.*

(a) *Filing.*—After the close of the hearing the complete transcript of testimony taken and the exhibits shall be filed with the Commission.

(b) *Corrections.*—A suggested correction in a transcript ordinarily will be considered only if offered not later than 20 days after the date each transcript is filed with the Commission. A copy of the letter (original only need be filed with the Commission) requesting the suggested corrections shall be served upon all parties of record and with 2 copies to the official reporter.

(c) *No free copies.*—No free copies of transcript will be furnished to any party to any proceeding.

BRIEFS; REPORTS; ORAL ARGUMENT

§1100.91 *Briefs; content and arrangement*

(a) *Due date.*—The due date of each brief must appear on its front cover or title page.

(b) *Table of contents; citations.*—A brief of more than 20 pages shall contain on its front flyleaves a table of contents and points made with page references, the table of contents to be supplemented by a list of citations, alphabetically arranged, with references to the pages in which they appear.

(c) *Sketch or chart.*—In proceedings wherein misrouting or undue prejudice or preference are alleged, the complainant should include as part of the brief a small sketch or chart adequately reflecting the situation.

(d) *Evidence abstract.*—A brief filed after a hearing may contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the pages of the record, if written, or exhibit where the evidence appears. In the event the party elects not to include a separate abstract in his brief, he should give specific reference to the portions of the record, whether transcript or otherwise relied upon in suport of the respective statements of fact made throughout the brief.

(e) *Requested findings.*—Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make.

(f) *Exhibit reproduction.*—Exhibits should not be reproduced in the brief, but may, if desired, be shown, within reasonable limits, in an appendix to the brief. Analyses of such exhibits should be included in the brief where pertinent.

§1100.92 *Briefs; when filed.*

In a proceeding which has been the subject of oral hearing, and in which briefs are to be filed, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from the close of the hearing unless otherwise ordered by the Commission. Repiy briefs are not permitted unless ordered by the Commission.

§1100.95 *Officer's initial decision.*

(a) *How served.*—An officer's initial decision will be served by mailing a copy to each party of record and to other persons who are believed to have an interest in the proceeding.

(b) *When and how effective as the order of the Commission.*—If no exceptions or appeal is filed to the initial decision made by a Commissioner, and administrative law judge, or a joint board and the Commission does not stay it, the initial decision becomes the order of the Commission upon expiration of the period for filing exceptions or appeals, or of any postponement of such period, or postponement of the effective date of such initial decision, and a notice stating that the initial decision has, giving the date, become the order of the Commission will be mailed to the parties by the Commission.

§1100.98 *Oral argument before Commission.*

(a) *Request, to whom addressed.*—Request for oral argument should be addressed to the Secretary, Interstate Commerce Commission. Oral argument shall be at the discretion of the Commission or its divisions.

(b) *Request, by whom made.*—Any party may submit a written request for oral argument, stating reasons therefor. No replies shall be entertained.

(c) *Request, when filed.*—Requests for oral argument shall be filed within 30 days after the date of service of the decision, order or requirement being appealed, unless a different time period is fixed by the Commission or division, which shall rule upon such requests by order.

(d) *Time allotment.*—Unless otherwise directed, the proponents of a rule or order will be allowed one half hour for oral argument and shall be heard first. Opponents, in the aggregate, will also be allowed one half hour. One counsel only will be heard for each side, unless additional presentations are specifically authorized and additional time is allocated for them.

ORDER COMPLIANCE; DAMAGE STATEMENTS

§1100.99 *Compliance with Commission's orders.*

When in consequence of proceedings under the act, the Commission has by its order directed a defendant or a respondent to do or desist from doing a particular thing, such defendant or respondent must notify the Commission on or before the date upon which such order becomes effective of the manner and details of compliance with the order. Such notification shall be in the form of an affidavit subscribed by an appropriate verification generally in the form prescribed in No. 6 of appendix B to these rules and must, when filed or tendered to the Commission for filing, show simultaneous service thereof upon all parties to the proceeding in accordance with rule 22(a). If a change in rates or schedules is required the notification must be given in addition to the filing of proper tariffs or schedules, and must specify the Interstate Commerce Commission numbers of the tariffs or schedules so filed.

§1100.100 *Statements of claimed damages based on Commission findings.*

When the Commission finds that damages are due, but that the amount cannot be ascertained upon the record before it, the complainant should immediately prepare a statement showing details of the shipments on which damages are claimed, in

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accordance with the form No. 5. (See appendix B.) The statement should not include any shipment not covered by the Commission's findings, or any shipment on which complaint was not filed with the Commission within the statutory period. The filing of a statement will not stop the running of the statute of limitations as to shipments not covered by complaint or supplemental complaint. If the shipments moved over more than one route a separate statement should be prepared for each route, and separately numbered, except that shipments as to which the collecting carrier is in each instance the same may be listed in a single statement if grouped according to routes. The statement, together with the paid freight bills on the shipments, or true copies thereof, should then be forwarded to the carrier which collected the charges for verification and certification as to its accuracy. If the statement is not forwarded immediately to the collecting carrier for certification, a letter request from defendants that forwarding be expedited will be considered to the end that steps be taken to have the statement forwarded immediately. All discrepancies, duplications, or other errors in the statements should be adjusted by the parties and correct agreed statements submitted to the Commission. The certificate must be signed in ink by a general accounting officer of the carrier and should cover all of the information shown in the statement. If the carrier which collected the charges is not a defendant in the case its certificate must be concurred in by like signature on behalf of a carrier defendant. Statements so prepared and certified shall be filed with the Commission whereupon it will consider entry of an order awarding damages.

§1100.101 *Administrative Appeals—proceeding involving both rail and nonrail matters.*

Administrative appeals shall be governed by the provisions of rule 103 (rail proceedings) in any proceeding in which a significant rail matter is involved regardless of whether nonrail matters are also involved.

1100.102 *Administrative Appeals—nonrail proceedings.*

The rules in this section apply to nonrail proceedings:

(a) *General.*—The term "administrative appeals" means exceptions and petitions for administrative review.

(b) *Exceptions.*—(1) Exceptions may be filed to an initial or tentative decision of an individual Commissioner, an administrative law judge, a joint board, or an examiner, and shall detail the assailed findings, with supporting citations to the record and authorities.

(2) Exceptions shall be confined to factual and legal issues which are essential to the ultimate and just determination of the proceeding and shall be based on the following grounds:

(i) That a necessary finding of fact is erroneous or unsupported by substantial evidence of record;

(ii) That a necessary legal conclusion or finding is contrary to law, Commission precedent or policy;

(iii) That an important question of law, policy or discretion, is involved which is without governing precedent; or

(iv) That prejudicial procedural error has occurred.

(3) Exceptions shall not exceed 30 pages in length, including the index of subject matter, argument, and appendices or other attachments, and replies shall be subject to the same limitation.

(4) Exceptions which are not timely filed or do not comply with the requirements in (1) through (3) above will be subject to rejection.

(c) *Conclusiveness.*—Unless the division or Commission, as the case may be, reverses, changes or modifies the prior decision, order, or requirement or unless the decision, order, or requirement is issued by the division or Commission in the first instance, or unless the decision, order, or requirement is issued by an employee board, no further administrative appeal shall lie.

(d) *Petitions for administrative review.*—(1) Except when no further administrative appeal shall lie, any party may file a petition for administrative review, which shall detail in what respects further hearing, rehearing, reargument or reconsideration is sought and the reasons therefor. (2) Such specifications of alleged error, relief sought, and argument in support thereof must be summarized, in a preface to the petition, suitably paragraphed, which shall be a succinct, but accurate and clear, condensation of the matters raised on petition. Except in extraordinary circumstances, and upon leave granted, the preface shall not exceed 3 pages. Replies to petitions shall also contain a preface of no more pages than permitted in the petition's preface, and shall address, point by point, the specifications of alleged error, relief sought, and argument in the preface to the petition. In proceedings in which a division reverses, changes, or modifies a prior decision by a hearing officer or an employee board, petitions for reconsideration addressed to the division in an appellate capacity, and replies thereto, shall not exceed 10 pages, in addition to the preface required by this paragraph. In all other proceedings, petitions for reconsideration, and replies thereto, shall not exceed 30 pages in addition to the preface required by this paragraph. (3) When in a petition filed under this section opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(e) *Time for filing.*—Exceptions and petitions for administrative review shall be filed within thirty days after the date of service of the decision, order or requirement. For replies, see rule 23.

(f) *Successive petitions.*—A party shall not be permitted to file a second administrative appeal unless the division or Commission, as the case may be, shall have reversed, changed or modified the prior decision, order or requirement, or where the decision, order, or requirement is issued by the division or Commission in the first instance, in which event the petition shall be limited to the reversal, change or modification, and successive administrative appeals upon substantially the same grounds shall not be entertained.

(g) *Administrative finality.*—The timely filing of exceptions and petitions for administrative review shall, and the Commission on its own motion may, stay the effect of the decision, order, or requirement until thirty days after the date of service of the order of the Commission, division or review board acting thereon, unless otherwise provided. Decisions of an employee board whether original or on review, are not administratively final.

(h) *Matters of general transportation importance.*—(1) Limitations on petitions for review of division decisions. Pursuant to authority granted in section 17(6) of the Interstate Commerce Act, the right to apply to the entire Commission for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division of the Commission in any proceeding shall be limited and restricted to those proceedings in which the entire Commission, on its own motion, determines and announces that an issue of general transportation importance is involved. In proceedings in which no such announcement has been made, but in which a division reverses, changes, or modifies a prior decision by a hearing officer or where the initial decision is made by a division, a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and with administrative finality.

(2) Petitions seeking a finding that an issue of general transportation importance is involved; 3-page limitation; time for filing; no reply permitted. in any proceeding which has involved the taking of evidence at oral hearing or by modified procedure in which the Commission has not noted the presence of an issue of general transportation importance, any party may, within 15 days after the service of a final decision, order, or requirement of a division or appellate division, as to which the filing of a petition for rehearing, reargument, or reconsideration is not permitted, file a petition requesting the Commission to find on its own motion that the proceeding is one involving an issue of general transportation importance. Any petition seeking such a finding shall not be considered an application for rehearing, reargument, or reconsideration within the meaning of section 17 of the act and shall not exceed 3 pages. No reply thereto may be filed and the ruling thereon will be final. Petitions seeking the relief specifically covered herein will not be entertained at any other stage of the proceeding.

(3) Copies of petitions and replies. In cases in which it has been determined and announced that an issue of general transportation importance is involved, there shall be furnished for the use of the Commission the original and 14 copies of each petition filed under this section and of replies to such petitions. A like number of copies shall be furnished of petitions seeking a finding that the proceeding involves an issue of general transportation importance.

(i) *Petitions for stay.*—A party may petition for stay of a decision, order or requirement pending a request for judicial review, for extension of the compliance date, for modification of the effective date or for similar procedural relief, stating reasons therefor. Such a petition shall be filed no less than five (5) working days in advance of the effective date, and no replies shall be entertained.

§1100.103 *Administrative Appeals—rail proceedings.*

The rules in this section apply to rail proceedings:

(a) *Voiding initial decisions, reports, or orders.*—The division or Commission may, in its discretion, void any requirement for an initial decision, report, or order, and may direct that any matter shall be considered forthwith by the division or Commission if it concludes that the matter involves a question of agency policy, a new or novel issue of law, or an issue of general transportation importance, or if the due and timely execution of its functions so requires.

(b) *Appeal of initial decision, report, or order.*—(1) Any party may file an appeal to an initial decision, report, or order which is issued in the first instance unless the division or Commission has voided the requirement for the same, (2) Appeals shall detail the assailed findings, with supporting citations to the record and authorities. Appeals shall be confined to factual and legal issues which are essential to the ultimate and just determination of the proceeding and shall be based on the following grounds:

(i) That a necessary finding of fact is erroneous or unsupported by substantial evidence of record;

(ii) That a necessary legal conclusion or finding is contrary to law, Commission precedent or policy;

(iii) That an important question of law, policy or discretion, is involved which is without governing precedent;

(iv) That prejudicial procedural error has occurred.

(3) Appeals shall not exceed 30 pages in length, including the index of subject matter, argument, and appendices or other attachments, and replies shall be subject to the same limitation.

(4) Appeals which are not timely filed or do not comply with the requirements in (1) through (3) above will be subject to rejection.

(c) *Time for filing.*—Appeals, including petitions for administrative review under this rule must be filed within 20 days after the service of the initial decision, report, or order, or within such further period (not to exceed 20 days) as the division or Commission may authorize. If no such appeal is timely filed, the order set forth in such initial decision or report shall become the order of the Commission at the exporation of the time for filing.

(d) *Successive administrative appeals.*—A party shall not be permitted to file a second administrative appeal, except that (1) petitions for administrative review pursuant to paragraph (e) below, and (2) petitions for stay pursuant to paragraph (g) below shall be permitted.

(e) *Petitions for administrative review.*—(1) Any party may file a petition for administrative review of the decision, order, or requirement of the division or Commission, subject to the following requirements:

(i) That the petition shall detail in what respects the proceeding involves a matter of general transportation importance or new evidence or changed circumstances exist which would materially affect the prior decision, order or requirement, and include a request that the Commission make such determination.

(ii) That, to the extent further hearing, rehearing, reargument or reconsideration is sought, the petition shall detail in what respects such relief is requested and the reasons therefor. When in a petition filed under this section opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(iii) That the petition shall not exceed 30 pages in length when the petition is a first appeal from an initial decision rendered by the division or Commission in the first instance. In all other instances, the petition shall not exceed 10 pages in length, although a separate preface and summary of arguments not exceeding 3 pages may also accompany the petition. Replies shall be subject to the same requirements.

(2) The filing of the petition itself shall not stay the effect of the prior decision, order or requirement.

(f) *Administrative finality.*—(1) The timely filing of an appeal shall stay the effect of the decision, order, or requirement pending the determination of such appeal. (2) Unless otherwise provided, the Commission, on its own motion, or upon petition, may stay the effect of a decision, order, or requirement of the division or Commission. (3) Any decision, order, or requirement of the division or Commission not stayed shall become administratively final 30 days after it is served on the parties, unless the Commission provides for such decision, order, or requirement to become effective at an earlier date.

(g) *Petitions for stay.*—A party may petition for stay of a decision, order, or requirement pending a request for judicial review, for extension of the compliance date, for modification of the effective date or for similar procedural relief, stating the reasons therefor. Such a petition shall be filed no less than 5 working days in advance of the effective or compliance date, and no replies shall be entertained.

1100.104 *Petitions not otherwise covered.*

A party seeking relief not otherwise provided for by these rules may file a petition for such relief, stating reasons therefor. Petitions barred by any other rule of practice shall not be entertained.

§1100.105 *Application of the rules; Time limits—Proceedings involving common carriers by railroad.*

In applying these rules to proceedings involving common carriers by railroad subject to part I of the Interstate Commerce Act, the Commission will be governed by the time limits specified in sections 17(9) and (14) of said act, as set forth in appendix G.

§1100.106 *Utilization of the Rail Services Planning Office and Other Commission Employees.*

The Commission may, in its discretion, call upon the Rail Services Planning Office for assistance in evaluation, analysis, fact finding and planning, particularly with regard to rulemaking proceedings, mergers and appeals within the Commission in an effort to focus issues and expedite matters before the Commission.

In rulemaking proceedings or complex adjudicatory proceedings, the Commission will utilize additional administrative law judges and employees of the Rail Services Planning Office for the taking of evidence or the receipt of views and comments and may, by Commission order, designate such additional procedures as it deems necessary to insure the expedited resolution of such proceeding.

§1100.107 *Enforcement of Time Limits; Disposition of pleadings—Proceedings involving common carriers by rail.*

(a) *Enforcement of Time limits.*—In proceedings with respect to any matter involving a common carrier by railroad, the failure of any party to meet prescribed time limits without a showing of extraordinary circumstances may result in the dismissal of any involved complaint, application or appeal or the striking of any petition, pleading, or motion. Should the Commission fail to meet a prescribed time limit for disposition of any matter, it must issue a statement to all parties of record: (1) explaining the reason for its failure and (2) delineating the steps it will take to expedite the matter.

(b) *Disposition of pleadings.*—In proceedings with respect to any matter involving a common carrier by railroad, any pleading or motion for which no specific provision as to time for disposition is made must be disposed of expeditiously and, in any event, not later than 60 days after the time permitted for filing pleadings and replies.

SUB-PART B SPECIAL RULES OF PRACTICE

§1100.200 *Rules of practice governing procedure in certain suspension and fourth-section matters.*

(a) The proceedings of the Suspension and Fourth Section Board shall be informal. No transcriptions of such proceedings will be made. Subpenas will not be issued and, except when applications or petitions are required to be attested, oaths will not be administered.

(b) Petitions for reconsideration of orders of the following may be filed by any interested person within 20 days after the date of the service of the orders:

(1) Suspension and Fourth Section Board,
(2) of Appellate Division 2 reversing, changing, or modifying a previous determination of an employee board, and
(3) of division 2 suspending schedules or granting or denying fourth-section relief prior to hearing in proceedings not subject to a prior determination by an employee board.

The original and six copies of every pleading, document or paper filed under this section shall be furnished for the use of the Commission. Any interested person may file and serve a reply to any petition for reconsideration permitted under this paragraph within 20 days after the filing of such petition with the Commission but if the facts stated in any such petition disclose a need for accelerated action, such action may be taken before expiration of the time allowed for reply. In all other respects, such petitions and replies thereto will be governed by the Commission's rules of practice.

(c) When the Suspension and Fourth Section Board has declined to suspend a proposed tariff or schedule, or any part thereof, a petition in writing by any protestant or protestants may be filed with the Commission for reconsideration by the designated appellate division provided it reaches the Commission at least 2 workdays prior to the effective date of the tariff or schedule in question. For the purposes of this section, a workday shall be considered any day except Saturday, Sunday, or a legal holiday in the District of Columbia. (A legal holiday of less than one day shall be considered a workday within the meaning of this section.) Petitions submitted under this section shall be filed with the Secretary of the Commission by 4 p.m., United States Standard Time (or by 4 p.m., Local Daylight Saving Time if that time is observed in the District of Columbia). Telegraphic notice or the equivalent thereof must be given by the petitioners to the respondent or respondents. As no replies to the petitions for reconsideration are contemplated under this rule, petitioners will be expected, except in unusual circumstances, to rely wholly on the information previously filed with the Suspension and Fourth Section Board. Written or telegraphic communication in intelligible form requesting reconsideration will be sufficient. Such request shall contain the following prefatory statement: "This matter requires expedited handling under Rule 200 of the Commission's Rules of Practice." A petition not timely filed shall be rejected by the Secretary.

§1100.225 *Rules of practice governing the procedure of the Motor Carrier Board, the Finance Board, the Operations Boards, the Special Permission Board, the Released Rates Board, and the Tariff Rules Board.*

(a) The proceedings of the Motor Carrier Board, the Finance Board, the Operations Boards, the Special Permission Board, the Released Rates Board, and the Tariff Rules Board shall be informal. No transcript of such proceedings will be made. Subpenas will not be issued and, except when applications, petitions, or statements are required to be attested, oaths will not be administered.

(b) A petition for reconsideration of an order of the Motor Carrier Board, the Operations Board, the Special Permission Board, the Released Rates Board, or the Tariff Rules Board may be filed by any interested person.

(c) A petition for reconsideration of a Finance Board decision may be filed only by a party to the proceeding.

(d) A petition for reconsideration pursuant ot paragraphs (b) and (c) of this section and reply thereto will be governed by the Commission's rules of practice, except as provided in paragraphs (e), (f), and (g) of this section.

(e) The original and six copies of every pleading, document, or paper permitted or required to be filed under this section, shall be furnished for the use of the Commission.

(f) A petition seeking reconsideration of an order of the Motor Carrier Board entered under section 210a(a) or 311(b) of the act must be filed within 20 days after the date of service of the order. Within 20 days after the filing of such petition with the Commission any interested person may file and serve a reply thereto.

(g) A petition seeking reconsideration of an affirmative order of the Motor Carrier Board entered pursuant to the rules and regulations governing transfers of property brokers' licenses, part 1045 of this chapter, passenger brokers' licenses, part 1133 of this chapter, motor carrier operating rights, part 1132 of this chapter, water carrier operating rights, part 1141 of this chapter, and freight forwarder permits, parts 1151 of this chapter, must be filed within 20 days following publication of a synopsis of such order in the Federal Register. In such a petition the matters claimed to have been erroneously decided and the alleged errors must be specified with particularity. If the petition contains a request for oral hearing, the request shall be supported by an explanation as to why the evidence sought to be presented cannot reasonably be submitted in affidavit form. Within 20 days after the final date for filing of such petitions with the Commission, any interested person may file and serve a reply thereto.

(h) *Service; Special Permission Applications.*—Every application requesting authority to change, cancel, or reissue a tariff matter under suspension or continued in effect as a result of suspension shall include a certificate showing simultaneous service thereof upon all parties to the investigation and suspension proceeding. Service shall be made in the manner specified in rule 22(a) of this part.

§1100.240 *Rules governing applications by motor carriers of property or passengers under section 5(2) and 210a(b) of the Interstate Commerce Act.*

(a) *Scope of rules.*—These rules govern the filing and handling of (1) applications under section 5(2) of the act respecting control, lease, and unification of operating rights and properties of motor carriers of property or passengers, and (2) applications for approval under section 210a(b) of the act of the temporary operation of motor carrier properties sought to be acquired in an application under section 5(2) of the act. Except as otherwise herein provided, the rules of general applicability shall govern.

(b) *Notice.*—(1) Notice of the filing of applications under section 5(2) will be given by the publication of a summary of the authority sought in the Federal Register. The summary will be prepared by the applicant, and the Commission will advise the applicant if the summary, in its view does not properly describe the transaction.

(2) If applicants propose that any portion of the operating rights involved in the transaction be canceled or restricted, such proposal will be included in the summary.

(3) The summary will state whether an application has or has not been filed for temporary authority under section 210a(b) of the act.

(4) No notice by applicants to interested persons is required, except that applicants are not relieved from the obligation to file copies of applications with Governors, State Boards, and Regional Directors of the Commission's Bureau of Operations as may be required by the prescribed form of application, and except as hereinafter provided in paragraph (d)(3) of this section.

(5) Except for good cause shown, amendments to applications which broaden the scope of the proposed transaction will not be allowed if tendered after notice of the filing of an application has been published in the Federal Register. Restrictive amendments may be submitted at any time, but if tendered after such publication, they may be allowed only in the discretion of the Commission, or by the hearing officer if the matter is assigned for hearing or prehearing conference.

(c) ***Protests and requests for hearing under section 5(2).***—(1) Protests to the granting of an application under section 5(2) of the act shall be filed with the Commission within 30 days after the date notice of the filing of the application is published in the Federal Register. A protest filed under these rules shall be served upon applicants' representatives named in the notice of filing published in the Federal Register. Unless otherwise specified in the notice, the original and one copy of the protest shall be filed with the Commission. Protests not in reasonable compliance with the requirements of this section may be rejected in the discretion of the Commission.

(2) Failure seasonably to file a protest will be construed as a waiver of opposition and participation in the proceeding.

(3) A protest against an application shall set forth specifically the grounds upon which it is made and the protestant's interest in the proceeding, shall request an oral hearing if one is desired, and shall specify with particularity the facts, matters and things relied upon, but shall not include issues or allegations phrased generally.

(4) Any request for an oral hearing shall be supported by a specific explanation as to why the evidence to be presented cannot reasonably be submitted in the form of affidavits, and shall set forth the approximate number of witnesses who would be presented by the protestant, an estimate of the hearing time required for such presentation, and whether a hearing at Washington, D.C., would be objectionable, and, if so, what place would be more suitable; and protestant shall certify in its protest that, if an oral hearing is held, it will appear and present evidence.

(5) Where a person has a limited interest in an application, which possibly could be eliminated by a restrictive amendment of the proposed transaction, such person may also include in a protest filed in conformity with this paragraph an offer to withdraw the protest in the event of acceptance of such amendment by applicants, and the Commission.

(6) Except as provided in subparagraph (5) of this paragraph, or for good cause shown, the failure of any person filing a protest to an application to appear at a hearing scheduled thereon shall be construed as a waiver of his right to participate further in the proceeding; such person shall no longer be considered as a party to the proceeding, and such person and any representative responsible for his participation in the proceeding may be subject to censure for failure to appear.

(7) Any interested person, not a protestant, desiring to receive notice of the time and place of any hearing, conference, or other proceedings shall notify the Commission by telegram or letter within 30 days from the date of the publication of the notice of the filing of the application in the Federal Register.

(d) ***Procedure to be followed under section 210a(b).***—(1) Subject to subparagraph (4) of this paragraph, protests to the granting of an application for temporary authority under section 210a(b) may be filed by persons who oppose, or intend seasonably to oppose, the application under section 5(2).

(2) The protest to temporary approval may be by telegram, letter, or other writing, of which only an original need be filed, or may be included in a protest filed under paragraph (c) of this section. If should state the interest of the protestant and the

grounds for the position taken in opposition to temporary approval, and should show service upon applicants' representatives.

(3) If an application for temporary authority is filed in a contested proceeding after the period for filing protests under paragraph (c) of this section has expired, applicants are required to furnish copies of such application to protestants. Notice will not thereafter be given by publication in the Federal Register.

(4) Applications for temporary authority under section 210a(b) will be disposed of without hearings or other proceedings, and without necessarily awaiting expiration of the period allowed for protests. If the application for temporary authority is filed within 30 days after the date of initial publication; or, if the application for temporary authority is filed after expiration of the 30 days from the date of initial publication of notice of the section 5 application and protests have been filed, copies of the temporary authority application shall be served on protestants, and action will not be taken in less than 20 days from the date of such service, unless circumstances require immediate action.

(e) *Hearing or other procedures under section 5(2).*—(1) The Commission will determine whether an assignment for oral hearing should be made, after notice to interested persons of the filing of the application has been published in the Federal Register and the period for filing protests has expired. At or prior to such time, applicants who do not intend to prosecute their application should promptly request dismissal thereof.

(2) Applicants who believe their application is not susceptible of handling without oral hearing may request oral hearing when the application is filed, or later, if additional evidence which cannot reasonably be submitted in the form of affidavits is required.

(3) If applicants request an oral hearing and show that such hearing is necessary, or if the proceeding is contested, applicants shall advise the approximate number of witnesses who will be presented, furnish an estimate of the hearing time required for such presentation, and state whether a hearing at Washington, D.C., would be objectionable, and, if so, what plate would be more suitable.

(f) *Notice of hearing, conference or other proceedings.*—(1) Notice of the time and place of any hearing, conference, or other proceedings will be given to applicants' representatives, applicants, protestants, and other interested parties by mailing to them the order or notice assigning the application for hearing, conference, or other procedure.

(2) A request by any party for a change in the time or place of an assigned hearing must set forth good and sufficient cause for the action requested, must be in writing and filed with the Commission not less than 10 days before the assigned hearing date, except in emergency circumstances, and must be served on all known parties of record at the same time and by the same method of communication as service is made on the Commission. Where such requests are filed less than 10 days before the date of hearing, the petitioning party shall state the reasons for his failure to make such request within the prescribed time.

(3) The applicants' representatives, protestants, and those who request notice of changes in time or place of hearing, conference, or other proceedings will be informed of such changes if notice is given by mail. If telegraphic notice becomes necessary, notice of such changes will be given by telegram only to those who request telegraphic notice at their expense.

(4) Upon receipt of an order or notice of a hearing assignment, applicants who no longer intend to proceed to hearing shall immediately and jointly request dismissal of

their application, with appropriate notification to all protestants, failing which applicants or their representatives, or both, may be subject to censure.

(g) *Intervention.*—Rule 73 relating to participation without intervention is inapplicable to applications subject to this section. No person who fails to file a protest as provided in these rules will be permitted to intervene in opposition except upon a showing of substantial reasons in a petition submitted in accordance with rule 72.

§ 1100.245 *Rules governing the issuance of Certificates of Registration under section 206(a)(6) of the act.*

(a) *Scope of rules.*—These rules govern (1) the matter of giving to interested persons, by publication in the Federal Register, of the filing of applications for State certificates of public convenience and necessity authorizing motor common carrier operations in the transportation of property or passengers in intrastate commerce, in connection with which the applicant, also desires to engage in transportation in interstate and foreign commerce under the provisions of section 206(a)(6) of the act, and certain related matters.

(2) The filing with the Interstate Commerce Commission of applications for Certificates of Registration based upon intrastate certificates of public convenience and necessity issued by a State Commission which contain a concurrent finding that the public convenience and necessity require operations in interstate and foreign commerce in accordance with the provisions of section 206(a)(6) of the act.

(3) The filing with, and the handling by, the Interstate Commerce Commission of petitions for reconsideration of the decisions of State Commissions, made pursuant to the provisions of section 206(a)(6) of the act, finding that the public convenience and necessity require motor common carrier operations in the transportation of property or passengers, in interstate and foreign commerce, which do not exceed the scope of the concurrently authorized motor common carrier operations in intrastate commerce contained in certificates of public convenience and necessity issued by such State Commissions. Except as otherwise herein provided, the rules of general applicability shall govern.

(b) *Notice to interested persons of the filing of State Applications.*—In accordance with such rules and regulations as may be prescribed by the State Commissions, any person seeking an intrastate certificate of public convenience and necessity, who or which also desires to engage in transportation in interstate and foreign commerce pursuant to section 206(a)(6) of the act, shall so notify the State Commission with which the intrastate application is filed at the time of filing the intrastate application. Notice to interested persons of the filing of such an application, and of the applicant's desire also to engage in transportation in interstate and foreign commerce, shall be given by the publication in the Federal Register of a summary of the authority sought as prepared by the State Commission and transmitted to the Interstate Commerce Commission at Washington, D.C. (See approved Form No. 7 in appendix B.) In order to afford interested persons a reasonable opportunity to be heard, such summaries must be forwarded to the Interstate Commerce Commission sufficiently in advance of any hearings that may be scheduled on the application so noticed. Except as otherwise may be required by the State Commission, no other notice by applicant to interested persons is necessary.

(c) *Conduct of, and participation in, State Commission application proceedings.*—Subject to the requirement of section 206(a)(6) of the act, that interested persons be afforded a reasonable opportunity to be heard, the rules and regulations of the State Commission with which the intrastate application is filed shall govern the conduct of, and participation in, any State hearings or other State Commission proceedings that may be held with respect to such application, notice of the filing of which has been published in the Federal Register pursuant to paragraph (b) of this section. Protests and requests for information concerning the time and place of State Commisson hearings or other proceedings, any subsequent changes therein, and any oher related matters shall be directed to the State Commission with which the application is filed and shall not be addressed to or filed with the Interstate Commerce Commission. The record made in the State Commission proceeding shall be made available to the parties to such proceeding upon payment of such costs as may be fixed or prescribed by the State Commission.

(d) *Applications to the Interstate Commerce Commission for certificates of registration.*—(1) Within 30 days after service by the State Commission of a certificate of public convenience and necessity authorizing motor common carrier operations in intrastate commerce and containing the recitations required by section 206(a)(6) of the act, the holder of such State certificate shall file with the Interstate Commerce Commission at Washington, D.C., an Application for Motor Carrier Certificate of Registration, Form BOR-100, §1003.1 of this chapter. Such application shall be prepared in accordance with and contain all information called for in the form of application and the instructions thereto. Copies of such application shall be furnished in such number, and be filed and served in the manner and upon the persons specified in the form of application.

(2) Upon receipt, an application for a Certificate of Registration will be assigned a docket number; and thereafter notice of the date of filing of the application and the docket number assigned thereto will be transmitted by the Interstate Commerce Commission to the applicant and those persons upon whom copies of the application were served by the applicant as specified in the form of application; and thenceforth all further proceedings therein before the Interstate Commerce Commission will be under such docket designation.

(3) Any party in interest, who or which opposed in the State Commission proceeding the authorization of operations in interstate or foreign commerce, shall be deemed to be a party in the corresponding application proceeding instituted in accordance with subparagraph (1) of this paragraph. No other person will be permitted to participate in such proceeding except upon a showing of substantial reasons in a petition submitted in accordance with rule 72 of the Commission's rules of practice.

(4) Except for good cause shown, and upon leave granted, failure to file an application for a certificate of registration within the 30-day time period specified in subparagraph (1) of this paragraph shall be construed as a waiver of any right thereafter to file for and obtain such a certificate.

(e) *Petitions for reconsideration of State Commission decisions made the subject of applications for Certificates of Registration.*—(1) Parties. Any party in interest, who or which opposed in the State Commission proceeding the authorization of operations in interstate or foreign commerce, may file with the Interstate Commerce Commission at Washington, D.C., a petition seeking reconsideration of the State Commission decision which is the basis for an application for a Certificate of Registration.

(f) *Disposition of Applications for Certificates of Registration and related petitions for reconsideration.*—Applications for Certificates of Registration and related petitions for reconsideration filed under these rules will be handled together and processed in a single proceeding and will be disposed of by the division of the Interstate Commerce Commission to which these matters may be assigned, Acting as an Appellate Division. Except as the Interstate Commerce Commission may, in its discretion, otherwise direct, a decision and order issued by the Appellate Division disposing of such an application and petition will be administratively final and petitions by any of the parties for reconsideration of such division's actions will not be entertained.

(g) *Disposition of Unopposed Applications for Certificates of Registration.*—Where the State Commission proceeding which resulted in the issuance of the State certificate sought to be made the basis of a Certificate of Registration was unopposed, or where petitions for reconsideration of the finding of the State Commission that the public convenience and necessity require operations in interstate and foreign commerce are not seasonably filed, the application for a Certificate of Registration will be disposed of in the most expeditious manner and, so far as practicable and legally permissible, without formal hearings or other proceedings.

§ 1100.246 ***Rules pertaining to proceedings for the discontinuance or change of train or ferry service.***

(a) *Scope of special rules.*—These special rules govern procedure before the Commission in proceedings commenced by carriers subject to part I of the Interstate Commerce Act, under and pursuant to the provisions of section 13a of said act, upon a notice under paragraph (1) of said section or by a petition under paragraph (2) thereof, with respect to a proposed discontinuance or change, in whole or in part, of the operation or service of any train or ferry.

(b) *General rules otherwise applicable.*—Except as provided otherwise in these special rules, proceedings upon notices and petitions filed under section 13a shall be governed by the rules of general applicability.

(c) *Notices and petitions by carriers.*—A notice filed under paragraph (1), and a petition under paragraph (2), of said section 13a shall be prepared in accordance with and contain the information called for by rules and regulations then in force with respect to such a notice or petition. See part 1122 of this chapter.

(2) *Filing requirements.*—Except for good cause shown, and upon leave granted, petitions under this rule shall be filed within 30 days after the date of the filing of an application with the Interstate Commerce Commission pursuant to paragraph (d)(1) of this section for a Certificate of Registration authorizing motor common carrier operations in interstate and foreign commerce under the provisions of section 206(a)(6) of the act, and such petition shall be filed under the docket number assigned to the related application proceeding.

(3) *Contents.*—Any such petition shall specify with particularity the facts, matters, and arguments relied upon; and unless a copy of such record already has been submitted by another petitioner, such petition shall be accompanied by a certified copy of the complete record made before the State Commission, including a transcript of any testimony taken and any exhibits filed before such State Commission, such copy to be provided by, and at the expense of, the petitioner. The petition shall conform in all respects to requirement of rules 15 and 17 of this Commission's rules of practice. The original and six copies of the petition, and one certified copy of the record made before the State Commission, shall be furnished for the use of the Interstate Commerce Commission.

(4) *Replies to petitions.*—A reply to a petition filed under these rules may be filed and served within 20 days after the final date for filing such petitions. The original and

six copies of the reply shall be furnished for the use of the Interstate Commerce Commission.

(5) *Service of petitions and replies.*—Copies of each petition and reply filed under these rules shall be served on the State Commission involved and on all other parties to the State Commission proceeding in accordance with the requirements of rule 22 of the Commission's rules of practice.

(6) *Effect of petitions.*—The filing under these rules of a petition for reconsideration shall not preclude or affect the institution of the motor carrier operations in intrastate commerce authorized by the State certificate; and failure seasonably to file a petition for reconsideration under these rules will be construed as a waiver of opposition and further participation in the related application proceeding for a certificate of registration.

(d) *Notice to interested parties.*—Notice of the institution of any investigation or of the time and place of any hearing, conference, or other proceeding will be given by the Commission to the carrier or carriers involved, the Governor and appropriate regulatory agency of each State in which the train or ferry affected is operated, protestants, and other interested parties of record, by mailing to them the order or notice instituting the investigation or assigning the hearing, conference, or other proceeding. Similar notice will be given to the same parties of changes in the time or place of hearing, conference, or other proceeding when time permits notice by mail; but, if telegraphic notice becomes necessary, notice of such changes will be given by telegram only to those who have requested telegraphic notice at their expense.

(e) *Participation at hearings without intervention.*—In an investigation proceeding under section 13a(1), or in proceedings upon a petition filed under section 13a(2), an appearance may be entered at the hearing without filing a petition in intervention or other pleadings, if there is full disclosure of the identity of the person or persons in whose behalf the appearance is to be entered, if the interest of such person in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented. A person in whose behalf an appearance is entered in this manner becomes a party to the proceeding.

(f) *Complaints and protests.*—When a notice is filed with the Commission pursuant to section 13a(1), proposing to discontinue or change, in whole or in part, the operation or service of any train or ferry between a point in one State and a point in any other State or in the District of Columbia, any interested person opposed to such proposal may file with the Commission a complaint or protest by telegram, letter, or other writing, of which only an original need be filed. Service thereof upon the carrier proposing the discontinuance or change is not required. A complaint or protest should identify the carrier and the particular train or ferry involved, and should state the interest of the complainant or protestant and the grounds for the opposition. The complaint or protest must be filed with the Commission in Washington, D.C., not later than 15 days before the date when the carrier proposes to make effective the discontinuance or change. The failure to reply will not be construed as an admission of any allegations contained in the protest or complaint.

(g) *Petitions for reconsideration of orders instituting an Investigation*—Petitions for reconsideration of an order instituting an investigation in relation to a proposed change or discontinuance may be filed by the carrier or carriers affected with 15 days after the date of service of the order. An original and six copies shall be furnished for the use of the Commission, and copies thereof shall be served upon the persons to whom copies of the notice of the carrier were required to be mailed by the rules and regulations prescribed by the Commission. See Section 1122.5 of this chapter. Any interested person may file and serve a reply to any petition for reconsideration permitted under this paragraph within 15 days after the filing of such petition with the Commission.

(h) ***Reconsideration of decision not to institute an investigation.***—A decision not to institute an investigation concerning a proposed discontinuance or change of service may be made the subject of a petition for reconsideration by any interested person, provided the petition reaches the Commission at least 2 workdays prior to the effective date of the proposed discontinuance or change of service. If an order is desired requiring continuance of the service pending hearing and decision upon investigation, the petition should reach the Commission at least 12 days before the discontinuance or change is scheduled to become effective. (Under section 13a(1) of the act, an order of the Commission requiring continuance of the operation or service, pending hearing and decision in an investigation, must be served upon the carrier or carriers affected thereby at least 10 days before a discontinuance or change would otherwise become effective.) For the purposes of this section, a workday shall be considered any day except Saturday, Sunday, or a legal holiday in the District of Columbia. (A legal holiday of less than one day shall be considered a workday within the meaning of this section.) Petitions submitted under this paragraph shall be filed with the Secretary of the Commission by 4 p.m., United States Standard Time (or by 4 p.m. Local Daylight Saving Time if that time is observed in the District of Columbia.) Written or telegraphic communication in intelligible form requesting reconsideration will be sufficient. The request for reconsideration shall contain the following prefatory statement: "This matter requires expedited handling under Rule 246 of the Commission's rules of practice." If in writing, an original and six copies of the petition shall be furnished for the use of the Commission. Telegraphic notice or its equivalent must be given by the petitioner to the carrier or carriers affected, and certification that such notice has been given must accompany the request for reconsideration. Action may be taken upon the petition without awaiting a reply, but if a reply is received prior to a decision upon the petition it will be given consideration. A petition not timely filed will be rejected by the Secretary.

(i) ***Protests.***—Section 13a(2) requires this Commission to conduct a full hearing in the State involved, before it may grant a petition filed thereunder for authority to discontinue or change the operation or service of any train or ferry operated wholly within the boundaries of that State. It is not necessary, therefore, that persons opposed to such a petition file a protest in order to obtain a hearing; but interested persons may file protests by complying with rule 40 or they may register their opposition by letter addressed to the Secretary, Interstate Commerce Commission, Washington, D.C. 20423, for the purpose of receiving notice of the time and place of the hearing. See paragraph (e) of this section in regard to participation at hearing.

1100.247 *Rules governing applications by motor carriers of property or passengers and brokers under sections 206 (except section 206(a)(6) relating to Certificates of Registration), 209 and 211, by water carriers under sections 302(e), 303, and 309, and by freight forwarders under section 419 of the act.*

(a) ***Scope and applicability of special rules.***—*(1) Scope.* These special rules govern the filing and handling pursuant to the provisions of the act of (i) applications for certificates, permits, and licenses respecting the transportation of property or passengers under sections 206 (except section 206(a)(6) relating to certificates of

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registration), 209, and 211, (ii) applications for certificates, permits, and exemptions respecting the water transportation of property or passengers under sections 302(e), 303, and 309, and (iii) applications for permits to operate as freight forwarders and for certificates of abandonment under section 410. Except as otherwise herein provided, the rules of general applicability shall apply.

(c) *Applicability.*—Except as otherwise provided herein these special rules shall apply to all applications enumerated in subparagraph (1) of this paragraph and filed with the Commission on and after May 20, 1966, and to such of those applications filed prior to that time as the Commission may designate by appropriate publication in the Federal Register.

(b) *Applications.*—(1) *Form and content.*—An application filed with the Commission under these special rules shall be prepared in accord with and contain the information called for in the form of application prescribed by the Commission or in instructions which may have been issued by the Commission with respect to the filing of such an application. An application for a certificate, permit, or license as defined in subparagraph (a)(1) must be accompanied by certifications of support on the prescribed form for each individual, corporation or partnership known to the applicant upon whose support applicant intends to rely. Except for good cause shown, no application will be accepted for filing unless it is accompanied by certifications as herein required. Upon request by any party, the applicant shall furnish such party with copies of all certifications filed with the application. If, subsequent to the filing of an application, additional witnesses become known to the applicant, applicant shall file a certification for each such witness with the Commission and shall concurrently serve copies thereof upon all parties of record. The total number of witnesses subject to this rule whose testimony is offered in support of the application may not exceed twice the number for whom certifications were filed with the application, whether the case is designated for oral hearing or for modified procedure. In cases designated for oral hearing, certifications of additional witnesses as provided above must be filed and served not later than 30 days prior to the date assigned for commencement of hearing: Provided, That, the presiding officer may authorize additional certifications for witnesses to be presented at a continued hearing to be filed and served not later than 30 days prior to the date of the continued hearing. No testimony will be received from witnesses for whom such certifications have not been timely received. Provided, however, that the provisions of this paragraph limiting the total number of witnesses and requiring certifications for subsequently discovered witnesses shall not be applicable to applications to transport passengers, and that certifications for subsequently discovered witnesses shall not be required in cases handled under modified procedure except when reassigned for oral hearing.

(2) *Copies and service.*—Copies of an application filed under these special rules shall be furnished in such number and shall be filed and served in the manner and upon the persons specified in the form or instructions.

(3) *Requests for handling applications without oral hearing.*—An applicant who believes its application is susceptible of handling without oral hearing may request such handling when the application is filed. If such a request is made at that time, the applicant shall submit with its application original verified statements of the facts to which its witnesses would testify at an oral hearing if one were held, together with one copy thereof which need not be verified. Applicant shall furnish copies of its verified statements to interested persons upon request from such interested persons.

(c) *Notice to interested persons.*—(1) Notice of the filing of applications to competitors and other interested persons will be given by the publication of a summary of the authority sought in the Federal Register. Such summary will be prepared by the Commission, and it shall be the responsibility of applicant promptly to advise the Commission if the summary does not properly describe the authority sought. No other notice by applicants to interested persons is required, except that applicants are not relieved from the obligation to file copies of applications with Governors, State Boards, and Regional Directors of the Commission's Bureau of Operations as may be required by the prescribed form of the application.

(2) ***Amendments***.—Except for good cause shown, amendments to applications which broaden the scope of the proposed operations will not be allowed if tendered after notice of the filing of an application has been published in the Federal Register.

Restrictive amendments acceptable to the Commission may be submitted at any time: Provided, That, except as hereinafter provided, in cases assigned for oral hearing amendments must be received by the Commission not later than (1) 30 days after the service date of a notice that the case has been assigned for oral hearing, or (2) the date of prehearing conference assigned to consider such amendments. Restrictive amendments submitted after such date may be considered by the Commission or presiding officer only if exceptional reason is shown why the amendment could not have been timely filed. Prehearing conferences assigned for the consideration of amendments shall be subject to the provisions of subparagraph (d)(6) of this rule respecting appearance at hearings.

(d) ***Protests and request for hearing***.—(1) Protests to the granting of an application shall be filed with the Commission within 30 days after the date notice of the filing of the application is published in the Federal Register. A protest filed under these rules shall certify that it has been served upon applicant's representative (or applicant, if no practitioner representing him is named in the notice of filing published in the Federal Register). Unless otherwise specified in the published notice, the original and one copy of the protest shall be filed with the Commission. Protests not in reasonable compliance with the requirements of these rules may be rejected in the discretion of the Commission.

(2) Failure seasonably to file a protest will be construed as a waiver of opposition and participation in the proceeding.

(3) A protest against any application shall set forth specifically the grounds upon which it is made and contain a detailed statement of the protestant's interest in the proceeding (including a copy of the specific portions of its authority which protestant believes to be in conflict with that sought in the application, and describing in detail the method (whether by joinder, interline, or other means) by which protestant would use such authority to provide all or part of the service proposed), shall request an oral hearing, if one is desired, and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally. Protests phrased in general terms and not complying with these specifications may be rejected.

(4) Any request for an oral hearing shall be supported by a specific explanation as to why the evidence to be presented cannot reasonably be submitted in the form of affidavits, and shall set forth the number of witnesses which would be presented by the protestant and an estimate of the hearing time required for such presentation. Protests embracing a request for oral hearing shall contain the following certification without further qualification:

> The undersigned hereby certifies that, if an oral hearing is held, protestant(s) will appear and present evidence of protestant(s) own operations and particular interest(s)

in the outcome of this application unless this application is amended so as to eliminate the interest(s) of protestant(s) as set forth in this protest.

(5) Where a person has a limited interest in an application, which possibly could be eliminated by a restrictive amendment to the application, which amendment must be acceptable to the Commission, it may also include in a protest filed in conformity with this paragraph an offer to withdraw the protest in the event of acceptance by applicant and the Commission of such amendment.

(6) Except where a restrictive amendment has been made as provided in subparagraph (5) of this paragraph, or for good cause shown, the failure of any person filing a protest to an application to appear at a hearing scheduled thereon shall be construed as a waiver of its right to participate further in the proceeding; such person shall no longer be considered as a party to the proceeding, and it and any representative responsible for its participation in the proceeding may be subject to censure for failure to appear. In addition, the mere appearance of protestant without the presentation of evidence of protestant's own operations and particular interest in the application may, in the absence of good cause shown, subject protestant and its representative to similar censure.

(7) An interested person, not a protestant, desiring to receive notice of the time and place of any hearing, conference, or other proceedings shall notify the Commission by telegram or letter (original and one copy) within 30 days from the date of the publication of the notice of the filing of the application in the Federal Register.

(8) A person (carrier) who does not file a protest as required by the regulations in this part, or who otherwise fails to remain a proper party to an application proceeding filed under the regulations in this part (by withdrawal of a previously filed protest, by failure to file verified statements in opposition as required by an appropriate order, by failure to appear at a scheduled oral hearing, or by other means), and who is not granted leave to intervene pursuant to the provisions of paragraph (h) of this section, except for good cause shown, may not personally, or through a representative, appear as a witness for a party protestant, except as provided hereafter. This provision shall not preclude the filing of a proper joint protest on behalf of several opposing carriers, or the presentation of evidence of service by bona fide connecting carriers through a duly qualified protestant, as to the nature and extent of their joint services, or other probative evidence, provided the party protestant's original protest contains a clear statement that its opposition is based, in part at least, upon a transportation service performed by it jointly with connecting carriers.

(e) *Hearing or other procedure to be followed—(1) Determination.*—The Commission will determine whether an assignment for oral hearing should be made, after notice to interested persons of the filing of the application has been published in the Federal Register and the period for filing protests has expired. At or prior to such time, any applicant who does not intend to prosecute its application should promptly request dismissal thereof.

(2) *Uncontested proceedings.*—Proceedings in which no protests are filed within 30 days after publication of notice in the Federal Register, and which are not assigned for oral hearing, will be determined on the basis of verified statements submitted by applicant. Where not submitted previously along with the application as provided in paragraph (b)(3) of this section, such statements, by order, will be required to be filed by the applicant with the Commission within the time prescribed in said order, failing which the application may be summarily dismissed for want of prosecution.

(3) *Contested proceedings.*—In those contested proceedings which the Commission determines that assignment of an application for oral hearing is unnecessary, thereafter the procedure shall be in accordance with rules 45(b), 46(b), and 47-54, inclusive, of the rules of practice, except that only the original and one copy of any statement made pursuant to rule 51 need be filed with the Commission. All other contested proceedings which are subject to these rules will be assigned for oral hearing, unless other procedures are ordered.

(f) *Failure to prosecute applications.*—An applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. Failure to prosecute an application under procedures ordered by the Commission will result in dismissal thereof. Submission of a request for dismissal of an application later than 15 calendar days after the service date of a notice setting it for oral hearing, or failure by applicant to appear and prosecute the application at such hearing will result in dismissal thereof and will bar the filing of any application for the same or any part of the same authority by the same applicant for a period of 1 year after the date of the dismissal order except upon a petition showing good cause why this rule should be waived. Such petition shall be served upon all protestants to the prior application.

(g) *Notice of hearing, conference or other proceedings—(1) Initial assignment.*—Notice of the time and place of any hearing, conference, or other proceedings will be given to applicant's representative, applicant, protestants, and other interested parties by mailing to them the order or notice assigning the application for hearing, conference, or other procedure.

(2) *Assignment of an application for hearing concurrently with notice of its filing.*—For the convenience of the Commission in handling applications related to one or more applications which already have been noticed in the Federal Register, when, in the Commission's discretion, the public interest would be served, an application may be concurrently noticed and assigned for hearing provided appropriate publication in the Federal Register can be made at least 1 week prior to the assigned date of hearing. Where such action is taken, and regardless of any prior publication of the application, any interested person may, without filing a protest prior to the assigned hearing, appear at the hearing in opposition to the application so assigned and become a party and be entitled to participate in that proceeding.

(3) *Requests for change.*—A request by any party for a change in the time or place of an assigned hearing must set forth good and sufficient cause for the action requested, must be in writing and filed with the Commission not less than 10 days before the assigned hearing date, except in emergency circumstances, and must be served on all known parties of record at the same time and by the same method of communication as service is made on the Commission. Where such requests are filed less than 10 days before the date of hearing, the petitioning party shall state the reasons for his failure to make such request within the prescribed 10 days.

(4) *Notice of changes.*—The applicant's representative (or applicant if it has no representative), protestants, and those who request notice of changes in time or place of hearing, conference, or other proceeding will be informed of such changes if notice is given by mail. If telegraphic notice becomes necessary, notice of such changes will be given by telegram only to those who request telegraphic notice at their expense.

(h) *Intervention.*—Rule 73 relating to participation without intervention is inapplicable to applications subject to this section. No person who fails to file a protest as provided in these rules will be permitted to intervene in opposition in a proceeding except upon a showing of substantial reasons in a petition submitted in accordance with rule 72.

Note: A General Policy Statement concerning Motor Carrier Licensing Procedures (Ex Parte No. 55) (was published May 3, 1966, at 31 FR 6600). Since the policy remains pertinent, the substance of that statement is repeated here, with modifications to update the factual information.

The number of applications filed for authority to conduct operations, in interstate or foreign commerce, as common or contract carriers by motor vehicle, continues to rise; and the upward trend shows no signs of abating. Motor carrier applications, comprising 70 percent of the Commission's formal case docket, rose from 5,655 filings in 1964 to 5,899 in 1975. At year's end, 5,805 such applications were still pending, even though 6,424 had been disposed of during the calendar year 1975.

Motor carrier application proceedings involve issues of substantial interest not only to the regulated transportation industry, but to every shipper and receiver of goods, regardless of the size of his operation; to manufacturers, wholesalers, distributors, and retailers; and to all members of the general public, both as buyers and consumers, and as travelers over the lines of the Nation's common carriers of passengers. To delay a determination that a newly proposed motor transportation is required by the public convenience and necessity or would be consistent with the public interest and the national transportation policy can result in an irretrievable loss of sales and can unjustifiably deprive the public of needed products and transportation services. For the regulated surface transportation industry to continue to thrive, to grow, and to keep pace with the expanding national economy, the mechanics of regulation must be such that administrative decisions are not only fair and impartial but are rendered with reasonable dispatch and efficiency. The regulatory process in which competing claims are considered and adjudicated must be geared to the type of proceeding involved, and must not entail an expenditure of time and money, either for the parties or the Government, which is disproportionate to the scope, importance, and economic signicance of the particular proceeding.

Under pastprocedures which provided for oral hearing in virtually all application cases, the Commission found that it was infeasible to deal with motor carrier application proceedings with the promptness and efficiency to which the parties are entitled, and which the nature of the proceedings themselves and the public interest require. Due and timely execution of the Commission's functions, imperatively and unavoidably, required that the procedures be modified to eliminate such requirements as were causing undue delay and unjustified expense.

To achieve timely decisions and insure adjudication with the maximum possible speed and efficiency consistent with the requirements of due process of law, this Commission adopted, among other things, a number of general policies and internal procedures governing motor carrier operating authority applications. A new application form was approved and revised special rules of practice were issued.

The policy stated May 3, 1966, its implementing rules and regulations were reaffirmed herein, though with slight modification. Additon modifications are under consideration in Ex Parte No. 55 (sub-No. 14) Revision of Application Forms for Operating Authority and Amendment to rules 22, 49, 51, 57, 74, and 247 of the General Rules of Practice, and Ex Parte No. 55 (Sub-No. 19), Revised Content Requirements and Page Limitations on Petitions for Reconsideration.

In processing the motor carrier caseload, the scheduling of unnecessary oral hearings will be avoided to the extent possible. Where the issues presented are well defined or where the matters involved are not of sufficient moment to justify the expense of an oral hearing, parties will be required to submit their evidence in the form of verified statements under the modified procedure, and the issuance of an initial decision by a hearing officer will be dispensed with. Oral hearings for the sole purpose of cross-examination will be scheduled only where material facts in dispute cannot be ascertained under the modified procedure.

All applications for motor carrier operating rights will be noticed in the Federal Register as at present. After the 30-day period for filing protests has expired the applications will be designated either for oral hearing or modified procedure. To the oral hearing docket will be assigned the more complex cases, and those which for one reason or another, might be handled more expeditiously and affectively with an oral hearing. Normally such cases will be the subject of an initial decision by the hearing officer.

To the modified procedure docket will be assigned those applications (whether or not opposed) in which an oral hearing is not deemed necessary. Assignment for modified procedure will be followed by an order requiring the submission of the supporting and opposing evidence under the present rules of practice. Such order will provide that "except for good cause shown" all preliminary motions or other requests for relief filed prior to a decision will not be handled separately but will be acted upon by those making the decision in the case.

Under modified procedure, once all verified statements are filed (whether or not the application is opposed) the case will be submitted to one of the five review boards, in rotation, to the extent practicable, for the issuance of final report. The board's decision will be subject to petition to Appellate Division 1.

A request for cross-examination by any party will be disposed of by the review board. If the board concludes that the request has merit, it will have the authority to refer the case for oral hearing. Requests which are found to be without merit will be denied in the board's report, with the reasons for the action taken. The review board also will have authority to refer for oral hearing any case in which it believes such treatment is warranted.

§1100.248 *Implementation of Public Law 91-375, Postal Reorganization Act (Motor Carrier Licensing Provisions).*

(a) *Scope of rules.*—These special rules govern the filing and handling of applications seeking the right to operate pursuant to either a Postal Certificte of Public Convenience and Necessity or a General Postal Certificate of Exemption authorizing operation, in interstate or foreign commerce, by motor vehicle in the transportation of mail.

(b) *Applications for postal certificates of public convenience and necessity.*—(1) The application form (Op-Or-10) shall be available from the Secretary, Interstate Commerce Commission, and shall be completed in duplicate, and transmitted to the Secretary, Interstate Commerce Commission, Washington, D.C. 20423, and a copy thereof shall be sent to the transportation regulatory commission (or, if none, the Governor) of each State within which operations are sought to be performed.

(2) Attached to the applications shall be a true copy of applicant's contract with the Postal Service (or its predecessor Post Office Department), which contract must have been in force on the effective date of section 5215 of the Postal Act.

(3) An applicant is a successor in interest to a qualifying star route carrier, evidence of continuity of star route service and carrier identity must be furnished (this may be done in letter form duly sworn and notarized).

(4) The application form provides space for a description of the territory served by the applicant on or before the effective date of section 5215. Here application should describe the territorial extent of operations performed pursuant to its contract in

force on the effective date, such description being in terms of the appropriate political division or subdivision (i.e., State, county, city, village, et cetera) within which service was authorized by contract. Authority may be granted only commensurate with the service covered by applicant's contract; therefore, applicants are cautioned to be specific in delineating the territory sought in order to avoid delays in processing their applications.

(5) Notice to the public of any such application will be made by publication in the Federal Register. Provision will be made for the filing of protests within 30 days from the date of publication, although it is not contemplated that protests will, in fact, be filed.

(6) Upon determination that an applicant is qualified to receive "grandfather" authority, and upon compliance by applicant with sections 215 and 221(c) of the Interstate Commerce Act, and with the rate-filing procedures established by this Commission, a Postal Certificate of Public Convenience and Necessity will be issued, authorizing the transportation of mail from, to, or between points in the involved territory.

(7) All further proceedings, including petitions for reconsideration, shall be handled in the manner specified in this Commission's rules of practice.

(c) *Applications for inclusion within general postal certificate of exemption.*—The class of carriers to which such certificate of exemption is applicable is defined as all star route, mail messenger and contract motor vehicle operators, where for-hire motor carrier operations are confined to a single State, and who, on the effective date of section 5215 of the above-entitled Postal Act, hold a contract for the transportation of mail wholly within a single State. Upon submission to this Commission of a copy of such contract, the name of the carrier's representative to whom inquiries may be made and the carrier's written request therefor, such carrier shall be included within the terms of the general postal certificate of exemption which reads as follows: General Postal Certificate of Exemption, Designated Single-State Motor Carriers Affected By the Postal Reorganization Act (Public Law 91-375).

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 3d day of March 1971.

After due investigation, it appearing that any motor carrier having complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and having complied with all the requirements established by this Commission in its report in Ex Parte No. MC-86, and lawfully engaging in operations solely within a single State in the transportation of mail; that the transportation of mail in interstate or foreign commerce performed by him is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by this Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in the Interstate Commerce Act; that he, therefore, is entitled to inclusion within a general postal certificate of exemption in accordance with the provisions of section 204(a)(4a) of part II of said act; and this Commission so find:

It is ordered, That the said motor carrier be, and it is hereby, granted this general postal certificate of exemption, which during the period it shall remain effective and unrevoked, shall exempt the said motor carrier from compliance with the provisions of part II of said act in respect of transportation of mail in interstate or foreign commerce, and it is hereby issued to said motor carrier.

It is further ordered, That this general postal certificate of exemption shall be effective from the date hereof and shall remain in effect until revoked in accordance with the provisions of said act.

§1100.249 *Special rule governing the filing of motor carrier mail transportation service orders or determinations under subsection (f) of section 5203 of title 39, United States Code 84 Stat. 768, 39 U.S.C. 5208*

(a) *Definitions*.—For the purposes of this section the following words and terms, except as otherwise indicated in the context of this section, are to be construed as follows:

(1) "Postal Service" means the U.S. Postal Service, 39 U.S.C. 201.

(2) Whenever a "section" is cited, it refers to a provision of title 39, United States Code, as revised and reenacted.

(3) "Commission" means the Interstate Commerce Commission.

(4) "Motor carrier" or "carrier" means a common carrier by motor vehicle as defined in subsection (5) of section 5201 of title 39, United States Code, 39 U.S.C. 5201.

(b) *Applicability*.—The provisions of this section shall apply to all orders or determinations of the Postal Service under section 5203 (39 U.S.C. 5203) directing a motor carrier to transport mail.

(c) *Filing and content of orders or determinations*.—(1) *General*.—All orders or determinations shall be filed by the Postal Service with the Commission at its office in Washington, D.C., and shall conform to the provisions of subparagraphs (2) and (3) of this paragraph.

(2) *Content*.—Each order or determination of the Postal Service shall include: (i) The full and correct name and business address of the motor carrier, (ii) a description of the mail transportation service required, (iii) a specification of the operating authority held by the carrier which corresponds to the mail transportation required, and (iv) a showing that the order or determination is consistent with orders of the Commission under sections 5207 and 5208 (39 U.S.C. 5207 and 5208), if any, or that the Postal Service and the carrier have agreed that the compensation for the transportation and service connected therewith is fair and reasonable. Further, each order or determination issued shall set forth in a conspicuous place on the face thereof, in bold-face type, a clear statement that the order or determination is concurrently filed with the Interstate Commerce Commission at Washington, D.C., that it is being simultaneously deposited with the Director, Office of the Federal Register, and that any protest seeking termination thereof under subsection (f) of section 5203 (39 U.S.C. 5203) must be filed in 15 days of the date of publication in the Federal Register. This statement may also include reference to the penalty provisions of section 5206 (39 U.S.C. 5206), and such other information as the Postal Service deems appropriate.

(3) *Copies; service*.—The original and *six* copies of each order or determination issued under this section shall be filed with the Commission, and one copy of the order or determination simultaneously shall be served upon the motor carrier

specified therein and upon any other person known to be interested, in such a manner so as to be received on the date the original is filed with the Commission, and a copy also should be simultaneously deposited with the Director, Office of the Federal Register, for publication therein as notice to all other interested persons. A certificate shall be executed by an authorized official of the Postal Service, showing upon whom simultaneous service has been made. The order or determination filed with the Commission and the envelope of transmittal to the Commission should be clearly marked: "Mail Transportation Service Order (or Determination)."

(d) ***Protests seeking termination of Postal Service orders or determinations, and replies thereto.***—(1) *General.*—A motor carrier subject to an order or determination of the Postal Service, or any of the carrier's other customers, may protest to the Commission and request termination of the order or determination. Such protests shall be restricted to the matter of showing that performance by the carrier of the required mail transportation service would be detrimental to the carrier or to its other customers, or that the carrier does not operate equipment suitable for the transportation of mail, and shall conform to the provisions of subparagraphs (2), (3), and (4) of this paragraph.

(2) *Content.*—The protest for termination of an order or determination filed under this section must identify the issued order or determination (i) by reference to the name and address of the motor carrier shown in the order or determination, (ii) the order number or other identification assigned thereto by the Postal Service, and (iii) specific citation to the volume, page, and date of publication in the Federal Register, i.e., "—— F.R.——,— —— 197–." Facts relied upon in support of the protest must be verified as provided in rule 50 of the Commission's rules of practice.

(3) *When filed.*—Protests requesting termination of an order or determination filed under this section will not be considered unless made in writing and filed with the Commission at Washington, D.C., within 15 days of the date of publication of the order or determination in the Federal Register.

(4) *Replies.*—Replies confined to rebuttal of such protests may be filed within 10 days of the date on which the protest was filed with the Commission.

(5) *Copies; service.*—The original and six copies of each protest or reply shall be filed with the Commission, and one copy simultaneously shall be served on the opposing party(ies). A certificate shall be executed stating that simultaneous service has been made. The protest or reply and the envelope of transmittal to the Commission should be clearly marked: "Protest (Reply)—Mail Transportation Service Order (or Determination," and be delivered free of all charges. (Copies for service on the Postal Service shall be addressed to the Assistant General Counsel Transportation, U.S. Postal Service, Washington, D.C. 20260, as agent for the Postmaster General.)

(e) *Petitions for reconsideration.*—Petitions for reconsideration (1) of an order terminating an order or determination of the Postal Service, or (2) of a notice declining to order termination of such an order or determination, may be filed by an interested person within 20 days after service of the order or notice of the Commission. As no replies to the petitions for reconsideration under this rule are contemplated in view of the statutory time limitation, petitioners will be expected, except in unusual circumstances, to rely wholly on the information previously filed with the Commission. Such petitions for reconsideration must be clearly marked: "Petition for Reconsideration—Mail Transportation Service Order (or

(d) *Filing of answer.*—Answers to claims of discrimination shall be so drawn as to fully advise the complainant, any other parties, and the Commission of the defense to the charge of discrimination against the shipment of recyclable materials that the respondent proposes to assert in its defense and otherwise conform to the requirements of the rules of practice.

(e) *Procedural handling.*—The proceeding following the commencement of the action as set forth in the foregoing rules shall be handled under modified procedure and will be accorded expeditious handling.

(f) *Intervention.*—(1) A summary of any complaint filed with the Commission under these rules will be published in the Federal Register as notice to interested parties, (2) Government agencies, environmental and other public interest groups, and trade associations having an interest in the proceeding may intervene as of right by filing a statement of their intention to participate within 20 days from the date that notice of the filing of a complaint is published in the Federal Register. After the expiration of that 20-day period, petitions for leave to intervene must be filed under rule 70 of the rules of practice, 49 CFR §1100.70.

(g) *Other procedures.*—In all other particulars, the proceeding shall be governed by the Commission's Rules of Practice.

APPENDIX A

Code of ethics for practitioners before the Interstate Commerce Commission

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PREAMBLE

No rules of conduct can be framed which will particularize all the duties of the practitioner in the varying phases of litigation or in his relations to clients, adversaries, other practitioners, the Commission and the public. The following canons of ethics are adopted as a general guide for those admitted to practice before the Interstate Commerce Commission.

It will be remembered that the practitioners before the Commission include (a) lawyers, who have been regularly admitted to practice law and (b) others having traffic or other technical experience qualifying them to aid the Commission in administration of the Interstate Commerce Act and related acts of Congress. The former are bound by a broad code of ethics and unwritten rules of professional conduct which apply to every activity of a lawyer; for the latter, no code of ethics has been written heretofore. The following canons do not release the lawyer from any of the duties or principles of professional conduct by which lawyers are bound. They apply alike to all practitioners before the Commission and the setting forth therein of particular duties or principles of conduct should not be construed as a denial of the existence of others equally imperative although not specifically mentioned. The word "Commission" as used herein includes divisions of the Commission, and the representatives of the Commission, whether members, examiners, or other employees connected with the matter in hand.

CANONS OF ETHICS

1. Standards of ethical conduct in courts of the United States to be observed. These canons are in furtherance of the purpose of the Commission's rules of practice which enjoin upon all persons appearing in proceedings before it to conform, as nearly as may be, to the standards of ethical conduct required of practitioners before the courts of the United States; and such standards are taken as the basis for these specifications, modified insofar as the nature of the practice before the Commission requires.

2. The duty of the practitioner to and his attitude toward the Commission. It is the duty of the practitioner to maintain toward the Commission a respectful attitude, not for the sake of the temporary incumbent of the office, but for the maintenance of the importance of the functions he administers. In many respects the Commission functions as a court, and practitioners should regard themselves as officers of that court and strive to uphold its honor and dignity. The Commission, not being wholly free to defend itself, is peculiarly entitled to receive the support of the practitioner against unjust criticism and clamor. Whenever there is proper ground for for serious complaint of a member or employee of the Commission it is the right and duty of the practitioner to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

3. Punctuality and expedition. It is the duty of the practitioner not only to his client, but to the Commission and to the public, to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

4. Attempts to exert political influence on the Commission. It is unethical for a practitioner to attempt to sway the judgement of the Commission by propaganda, or by enlisting the influence or intercession of members of the Congress or other public officers, or by threats of political or personal reprisal.

5. Attempts to exert personal influence on the Commission. Marked attention and unusual hospitality on the part of a practitioner to a Commissioner, examiner, or other representative of the Commission, uncalled for and unwarranted by the personal relations of the parties, subject both to misconstruction of motive and should be avoided. A self-respecting independence in the discharge of duty, without denial or diminution of the courtesy and respect due the official station is the only proper foundation for cordial personal and official relations between Commission and practitioners.

6. The selection of Commissioners. The nomination of commissioners is a duty of the President, and confirmation, of the Senate. It is the duty of the practitioners insofar as they attempt to advise the appointing or confirming officers, to endeavor to prevent any consideration from outweighing fitness in the selection.

7. The practitioner's duty in its last analysis. No client, corporate or individual, however powerful, no cause, civil or political however important, is entitled to receive, and no practitioner should render, any service or advice involving disloyalty to the law or disrespect of its official ministers, or corruption of any person or persons exercising a public office or employment or private trust, or deception or betrayal of the public. In rendering any such improper service or advice the practitioner invites and merits stern and just condemnation. Correspondingly, he advances the honor of his calling and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, although until a statute shall have been construed and interpreted by competent adjudication, he is free and entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all he will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

8. Private communications with the Commission. In the disposition of contested proceedings brought under the Interstate Commerce Act the Commission exercises quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity. It is required to administer the act and to consider at all times the public interest beyond

Determination)." Petitioners shall file an original and six (6) copies of the petition with the Commission and one copy thereof shall be served simultaneously on the opposing party(ies), and a certificate of service shall be executed to that effect.

(f) *Withdrawal of Postal Service orders or determinations.*—If, within 90 days after the filing of an order or determination by the Postal Service, the motor carrier cited in the order or determination voluntarily agrees and undertakes to perform the required mail transportation service, the Postal Service shall promptly notify the Commission of such action and shall withdraw the Postal Service order forthwith.

§1100.251 *Special rules for proceedings in which the elimination of discrimination against the shipment of recyclable materials is sought.*

(a) *Filing of complaint.*—A person seeking elimination of discrimination against shipments of recyclable materials shall file a formal complaint. Such complaint should be so drawn as to fully advise the parties defendant and the Commission of the descrimination against recyclables complained of; make specific reference to the tariffs or schedules containing the rates, fares, or charges occasioning the discrimination against the shipment of recyclable materials, if the claimed discrimination is said to be occasioned by the rate structure; and in all other respects comport with the requirements for the commencement of proceedings as set forth in the rules of practice.

(b) *Discrimination defined.*—For the purpose of these rules, "discrimination" is understood to encompass, but not be limited to, situations in which carriers charge different rates and/or charges for substantially similar transportation service on recyclable materials which are competitive, in whole or in part, with virgin natural resource materials. Any complainant of the view that the "discrimination" referred to in section 603 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 793 (1974), is other than "unjust discrimination" prescribed by section 2 of the Interstate Commerce Act shall set forth the reasons therefor in said complaint.

(c) *Recyclable materials defined.*—For the purpose of these rules, the term "recyclable materials" includes, but is not limited to, commodities shown in Standard Transportation Commodity Code Tariff No. 1-B, Traffic Executive Association—Eastern Railroads, Agent, I.C.C. No. C-998, issued jointly with other agents, effective April 1, 1974, including the following:

STCC No.:	*Commodity*
22	Textile waste garneted or processed.
22 973 15	Noils, ramie.
22 973 25	Noils (Combinds or comb—
22 973 68	Rovings, jute and istle (ixtle).
32 299 24	Cullet (broken glass).
33 119	Blast furnace or coke oven products, nec.
32 312	Copper matte, speiss or flue dust.
33 322	Lead matte, speiss or flue dust.
33 332	Zinc dross, residues, ashes.
33 342	Aluminum residues.
33 398	Miscellaneous nonferrous metal residue.
40 1	Ashes.
40 2	Waste or scrap.

the mere interest of the particular litigants before it. To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a Commissioner, examiner, or other representative of the Commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them. Practitioners at all times should scrupulously refrain in their communications to and discussions with the Commission and its staff from going beyond ex parte representations that are clearly proper in view of the administrative work of the Commission.

9. Adverse influences and conflicting interests. It is the duty of a practitioner at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of the person to represent or assist him.

It is unethical to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon a practitioner represents conflicting interests when in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

10. Joint association of practitioners and conflicts of opinion. A client's proffer of the assistance of additional practitioner should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A practitioner should decline association as colleague if it is objectionable to the practitioner first retained, but if the client should relieve the practitioner first retained, another may come into the case.

When practitioners jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted by them unless the nature of the difference makes it impracticable for the practitioner whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another practitioner are unworthy of those who should be brethern, but nevertheless, it is the right of any practitioner, without fear or favor, to give proper advice to those seeking relief against an unfaithful or neglectful practitioner generally after communication with the practitioner of whom the complaint is made.

11. Withdrawal from employment. The right of a practitioner to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The practitioner representing him should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the practitioner's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the practitioner may be warranted in withdrawing on due notice to the client, allowing him time to employ another. So also when a practitioner discovers that his client has no case and the client is determined to continue it; or even if he finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, he should refund such part of the retainer as has not been clearly earned.

12. Advising upon the merits of a client's cause. A practitioner should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. He should beware of bold and confident assurances to clients, especially where employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

13. Negotiations with opposing party. A practitioner should not in any way communicate upon the subject of controversy with a party represented by another practitioner except upon express agreement with the practitioner representing such party; much less should he undertake to negotiate or compromise the matter with him, but should deal only with the practitioner who represents the other party. It is incumbent upon the practitioner most particularly to avoid everything that may tend to mislead a party not represented by a practitioner, and he should not undertake to advise him as to the law.

14. Fixing the amount of the fee. In fixing fees, practitioners should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, although his poverty may require a less charge, or even none at all.

15. Compensation, commission, and rebates. A practitioner should accept no compensation, commissions, rebates, or other advantages from the parties to the proceeding other than his client without the knowledge and consent of his client after full disclosure.

16. Contingent fees. Contingent fees should be such only as are sanctioned by law. In no case, except a charity case, should they be entirely contingent upon success.

17. Division of fees. No division of fees for services is proper, except with a member of the bar or with another practitioner, based upon a division of service or responsibility. It is unethical for a practitioner to retain laymen to solicit his employment in pending or prospective cases, and reward them by a division of fees, and such a practice cannot be too severely condemned.

18. Suing clients for fees. Controversies with clients concerning compensation are to be avoided insofar as compatible with self-respect and with the right to receive reasonable recompense for services; and lawsuits against clients should be resorted to only to prevent injustice, imposition or fraud.

19. Acquiring interest in litigation. The practitioner shall not purchase or otherwise acquire any pecuniary interest in the subject matter of the litigation which he is conducting.

20. Expenses. A practitioner may not properly agree with a client that the practitioner shall pay or bear the expenses of litigation. He may in good faith advance expenses as a matter of convenience but subject to reimbursement by the client.

21. Witnesses. A practitioner shall not undertake that the compensation of a witness shall be contingent upon the success of the cause in which he is called. If the ascertainment of truth requires that a practitioner should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client.

22. Dealing with trust property. Money of the client or other trust property coming into the possession of the practitioner should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with the practitioner's private property or be used by him.

23. How far a practitioner may go in supporting a client's cause. Nothing will operate more certainly to create or foster popular prejudice against practitioners as a class, and deprive them of that full measure of public esteem and confidence which belongs to the proper discharge of their duties than does the false claim, often set up by the unscrupulous in defense of questionable transaction, that it is the duty of the practitioner to do whatever may enable him to succeed in winning his client's cause.

The practitioner owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by rules of law, legally applied. No fear of the disfavor of the Commission or public unpopularity should refrain him from full discharge of his duty. The client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his counsel to assert every such remedy or defense. But it is to be steadfastly borne in mind that this great trust is to be performed within and not without the bounds of the law. Admission to the privilege of appearing before the Commission as representing another does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

24. Restraining clients from improprieties. A practitioner should use his best efforts to restrain and to prevent his clients from doing those things which he himself ought not to do, particularly with reference to their conduct towards the Commission, other practitioners, witnesses and suitors. If a client persists in such wrong-doing, the practitioner should terminate their relations.

25. Ill-feeling and personalities between advocates. Clients, not their representatives, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence practitioners in their conduct and demeanor toward each other or toward suitors in the case. All personalities between practitioners should be scrupulously avoided. In the trail of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of practitioners on the other side. Personal colloquies between practitioners which cause delay and promote unseemly wrangling should also be carefully avoided. Their statements should be addressed to the Commission.

26. Treatment of witnesses and litigants. A practitioner should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudice of a client in the trial or conduct of a cause. The client cannot be made the keeper of the practitioner's conscience in such matters. He has no right to demand that the practitioner representing him shall abuse the opposing party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking on his own behalf.

27. (none)

28. Discussion of pending litigation in public press. Attempt to influence the action and attitude of the members and examiners of the Commission through propaganda or through colored or distorted articles, in the public press, are more apt to react against than in favor of the parties resorting to such measures. On the other hand, it is not against the public interest or unfair to the Commission that the facts of pending litigation shall be made known to the public through the press in a fair and unbiased manner and in dispassionate terms. Practitioners should themselves avoid, and should counsel their clients against, giving to the public press any press notices or statements of a nature intended to inflame the public mind, to stir up possible hostility toward the Commission, or to influence the Commission's course and judgment as to pending or

anticipated litigation. When the circumstances of a particular case appear to justify a statement to the public through the press, it is unethical to make it anonymously.

29. Candor and fairness. The conduct of practitioners before the Commission and with other practitioners should be characterized by candor and fairness. The nontechnical character and liberality of the Commission's practice call for scrupulous observance of the principles of fair dealing and just consideration for the rights of others.

It is not candid or fair for a practitioner knowingly to misstate or misquote the contents of a paper, the testimony of a witness, the language or the argument of an opposing practitioner, or the language or effect of a decision or a text book; or, with knowledge of its invalidity to cite as authority a decision which has been overruled or otherwise impaired as a precedent or a statute which has been repealed; or in an argument to assert as a fact that which has not been proved, or to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A practitioner should not offer evidence, which he knows the Commission should reject, in order to get the same before the Commission by argument for its admissibility, or arguments upon any point not properly calling for determination. He should not introduce into an argument remarks or statements intended to influence the bystanders.

These and all kindred practices are unethical and unworthy of a practitioner.

30. Right of practitioner to control the incidents of the trial. As to incidental matters pending the trial, not affecting the merits of the cause or working substantial prejudice to the rights of the client, such as forcing the opposing practitioner to trial when he is under affliction or bereavement, forcing the trial on a particular day to the injury of the opposing practitioner when no harm will result from trial at a different time, agreeing to extensions of time and the like, the practitioner and not the client, must be allowed to judge. In such matters no client has a right to demand that his practitioner shall be illiberal or do anything therein repugnant to the practitioner's sense of honor and propriety.

31. Taking technical advantage of opposing practitioner; agreements with him. A practitioner should not ignore known customs or practice of the Commission, even when the law permits, without giving timely notice to the opposing practitioner. Insofar as possible, important agreements affecting the rights of the clients should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing.

32. Advertising, direct or indirect. The most worthy and effective advertisement possible is the establishment of a well-merited reputation for capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation or ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not improper. But solicitation of employment by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unethical. It is equally unethical to procure business by indirection through touters of any kind. Indirect advertisement for employment by furnishing or inspiring newspaper comments concerning causes in which the practitioner has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the

importance of the practitioner's positions, and all other like self-laudation, lower the tone of the calling and are intolerable.

33. Professional card. The simple professional card mentioned in canon 32 may with propriety contain only a statement of the practitioner's name (and those of his associates), occupation, address, telephone number, and special branch or branches of practice. Such cards may be inserted in reputable lists and may give authorized references, or name clients with their permission.

34. Stirring up litigation, directly or through agents. It is unethical for a practitioner to volunteer advice that a proceeding be brought before the Commission, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unethical but it is indictable at common law. It is disreputable for a practitioner to hunt up defects or other causes of action and disclose them in order to be employed to bring complaint, or to breed litigation by seeking out those having claims for damages or any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly, or indirectly, those who bring or influence the bringing of such cases to his office to seek his services. No complaint should be brought before the Commission by a practitioner except with the distinct knowledge and specific consent of the client in the particular case. A duty to the public and to the Association devolves upon every member having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disciplined or disbarred.

35. Justifiable and unjustifiable litigation. The practitioner must decline to conduct a cause or to make a defense when convinced that it is intended merely to harass or to injure the opposing party, or to work oppression or wrong. But otherwise, it is his right, and having accepted retainer, it becomes his duty, to insist upon the judgment of the Commission as to the merits of his client's claim. His appearance should be deemed equivalent to an assertion upon his honor that in his opinion his client's case is one proper for determination.

36. Responsibility for litigation. No practitioner is obliged to act either as adviser or advocate for every person who may seek to become his client. He has the right to decline employment. Every practitioner upon his own responsibility must decide what employment he will accept, what causes he will bring before the Commission for complainants, or contest for defendants or respondents. The responsibility for advising as to questionable transactions, for bringing questionable proceedings, for urging questionable defenses is his alone. He cannot escape it by urging as excuses that he is only following his client's instructions, or that he is under a stated retainer or in the regular employment of his client.

37. Discovery of imposition and deception. When a practitioner discovers that some fraud or deception has been practiced, which has unjustly imposed upon the Commission or a party, he should endeavor to rectify it; first by advising his client to forego any advantage thus unjustly gained and, if his client refuses, by promptly informing the injured person or his counsel (practitioner) so that appropriate steps may be taken.

38. Upholding the honor of the calling. Practitioners should expose without fear or favor before the proper tribunals corrupt or dishonest conduct and should accept without hesitation employment against a practitioner who has wronged his client. The practitioner upon the trial of a cause in which perjury has been committed owed it to the Commission and to the public to bring the matter to the knowledge of the prosecuring authorities. The practitioner should aid in guarding the bar of the

Commission against admission thereto of candidates unfit or unqualified because deficient in either moral character or education. A practitioner should propose no person for admission to practice before the Commission unless from personal knowledge or upon reasonable inquiry he sincerely believes and is able to vouch that such person possesses the qualifications prescribed in the Commission's rules of practice. He should strive at all times to uphold the honor and maintain the dignity of his calling and to improve not only the law but the administration of justices.

39. Intermediaries. The services of a practitioner should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and practitioner. His responsibility and qualifications are individual. He should avoid all relations which direct the performance of his duties in the interest of such intermediaries. His relation to the client should be personal, and the responsibility should be direct to the client.

He may accept employment from any organization such as an association, club or trade organization, authorized by law to be a party to proceedings before the Commission, to render services in such proceedings in any matter in which the organization, as an entity, is interested. This employment should only include the rendering of such services to the members of the organization in respect to the individual affairs as are consistent with the free and untrammeled performance of his duties to the Commission.

Nothing in this canon shall be construed as conflicting with canon 17.

40. Retirement from public employment. A practitioner, having once held public office or having been in the public employ, should not after his retirement, accept employment as an advocate or adviser in the same proceeding or as to the same, or substantially the same, facts as were involved in any specific question which he investigated or passed upon in a judicial or quasi-judicial capacity while in such office or employ, whether the same or different parties are concerned.

41. Confidences of a client. The duty to preserve his client's confidences in the course of his employments outlasts the practitioner's employment, and extends as well to his employees. None of them should accept employment which involves the disclosure or use of these confidences, either for the private advantage of the practitioner or his employees or to the disadvantage of the client, without knowledge and consent of the client even though there are other available sources of such information. A practitioner should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a practitioner is falsely accused by his client, he is not precluded for disclosing the truth in respect to the false accusation. The announced intention of a client to commit a crime is not included within the confidences which a practitioner is bound to respect. He may properly make such disclosures as to prevent the act or protect those against whom it is threatened.

42. Partnerships-names. Partnerships among practitioners for the practice of their calling are very common and are not to be condemned. The rules of the Commission provide that corporations of firms will not be recognized. Practitioners before the Commission should therefore appear individually and not as members of partnerships. In the formation of partnerships care should be taken not to violate any law locally applicable; care should also be taken to avoid any misleading name or representation which would create a false impression as to the position or privileges of a member not locally admitted, or who is not duly authorized to practice, and as such amenable to discipline. No person should be held out as a practitioner or member who is not so

admitted. No practitioner who is not admitted to practices in the courts should be held out in a way which will give the impression that he is so admitted. No false or assumed or trade name should be used to disguise the practitioner or his partnership. The continued use of the name of a deceased or former partner is or may be permissible by local custom, but care should be taken that no imposition or deception is practiced through this use. If a member of the firm becomes a Commissioner, or an examiner or other employee of the Commission his name should not be retained in the firm name, as such retention may give color to the impression that an improper relation or influence is continued or possessed by the firm.

This canon does not inhibit the association of a practitioner with a mercantile, manufacturing, or other commercial institution, in the capacity of its representative or adviser.

43. Titles. No member of the Association not admitted to the bar shall use the title "Attorney" or "Counsel" but should use the title "Traffic Manager," "Practitioner before the Interstate Commerce Commission," "Registered Practitioner," or other appropriate title or designation.

APPENDIX B

Approved forms

TABLE OF CONTENTS

1. Complaint; verification.
2. Answer.
3. Certificate of service.
4. Petition for leave to intervene.
5. Form of reparation statement under Rule 95.
6. Verification for statements of fact filed under modified procedure.
7. Approved Form No. 7 under Rules 245.

[These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary. Before using such forms the pertinent rules, particularly those referred to in the footnotes, should carefully be studied.]

NO. 1 COMPLAINT[1]

Before the Interstate Commerce Commission

COMPLAINT

____

v

____

---

[1] See rules 24 to 31, inclusive.

[Insert without abbreviation the names of the complainant and defendant (Including each of the receivers, operating trustees, or other legal representatives of defendant), and whether a corporation, firm or partnership, specifying the individual name of the parties composing the partnership; and the post office address of any motor carrier defendant.]

The complaint of the above-named complainant respectfully shows:

I. [complainant should here state nature and place of business, also whether a corporation, firm, or partnership and if a firm or partnership, the individual names of the parties composing same.]

II. That the defendant above-named is [here state whether: (a) carrier by railroad, express, motor vehicle (common or contract), water (common or contract), a freight forwarder, or otherwise; (b) the transportation is of property or passengers, or both; and (c) the transportation involves a freight forwarder or more than one type of carrier (specifying particulars) between points in the State of   and points in the State of   [a complaint under part II should specifically name the States in and through which the transportation which gives rise to the complaint is performed] and as such defendant is subject to the provisions of the Interstate Commerce Act.

III. That [state in this and subsequent paragraph to be numbered IV, V, et cetera, the matter or matters intended to be complained of, naming every rate, fare, charge, classification, regulation, or practice the lawfulness of which is challenged, and also, if practicable, the points between which the rates, et cetera, complained of are applied. Where it is impracticable to designate each points, describe clearly the rate territory or rate group involved, Whenever practicable tariff or schedule reference should be given.]

[Where unlawful discrimination, preference, or prejudice is alleged the particular elements specified in the act as constituting such violation (see sections 2, 3, 4, 13, 216, 217, 218, 305, and 406) and the facts upon which complainant relies to establish the violation should be stated clearly. Where any provision of the act other than those just mentioned, or any requirement established pursuant to the act, is alleged to be violated, the pertinent statutory provision, or established requirement, together with the facts which are alleged to constitute the violation, should be stated. If two or more subsections of the act or requirements established pursuant thereto are alleged to be violated, the facts claimed to constitute violation of one subsection, or requirement, should be stated separately from those claimed to constitute a violation of another subsection, or requirement, wherever that can be done by reference or otherwise without undue repetition.]

X. That by reason of the facts stated in the foregoing paragraphs complainant has been subjected to the payment of rates [fares or charges, et cetera] for transportation which were when exacted and still are (1) unjust and unreasonable in violation of section   , of the Interstate Commerce Act, and (2) unjustly discriminatory in violation of section   , and (3) unduly preferential or prejudicial in violation of section   , and (4) in violation of the long-and-short haul [or aggregate of intermediate rates] provision of section 4 thereof. [Use one or more of the allegations numbered (1), (2), (3), (4), or other appropriate allegation according to the nature of the complaint.] That [if recovery of damages is sought] complainant has been unjured thereby to his damage in the sum of $.

Wherefore complainant prays that defendant be required to answer to charges herein; that after due hearing and investigation an order be made commanding said defendant [and each of them] to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of between the origin and destination points named in paragraph hereof, in lieu of the rates [fares or charges, et cetera], named in said paragraph, such other rates [fares, or charges, et cetera], as the Commission may deem reasonable and just [and also, if recovery of damages is sought, pay to complainant by way of reparation for the unlawful charges hereinbefore alleged the sum of $, or such other sum, as in view of the evidence to be adduced herein, the Commission shall determine that complainant is entitled to an award of damages under the provisions of said act for violation thereof], and that such other and further order or orders be made as the Commission may consider proper in the premises.

Date at ______________________________, 19____.

____

(Complainant's signature[2])

____

(Office and post-office address)

____

(Signature of practitioner)

____

(Post-office address)

VERIFICATION[1]

STATE OF ____________________] ss
County of ____________________]

______________________________, being duly sworn, deposes and says: that he is the complainant (or, one of the complainants; or, is the (insert title of the affiant if complainant is a corporation) of the company, complainant) in the above-entitled proceeding; that he has read the foregoing complaint, and knows the contents thereof; that the same are true as stated, except as to matters and things if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

____

---

[1] See footnote to verification.

[2] Signature and verification by complainant unnecessary if complaint is signed by a practitioner. See rule 15.

Subscribed in my presence, and sworn to before me, by the affiant above named, this day of , 19 .

[USE AN L.S. IMPRESSION SEAL]

____

[Title of Officer]

Commission expires

NO. 2. ANSWERS[4]

Before the Interstate Commerce Commission

ANSWER

Docket No. ____________________

____

v.

____

The above-named defendant, for answer to the complaint in this proceeding, respectively states:

I. [Here set forth appropriate and responsive admissions, denials, and averments, specifically answering the complaint paragraph by paragraph.]

Wherefore defendant prays that ______________________________

Dated ______________________________________,

____

(Name of defendant)

By[5] ______________________________________

____

(Title of Officer)

____

(Office and post-office address)

____

((Signature of Practitioner)

____

(Post-office Address)

---

[4] See rules 33 to 35, inclusive.

[5] See rule 15.

NO. 3 CERTIFICATE OF SERVICE[6]

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by (here state the precise manner of making service, which must be consistent with the provisions of Rule 22).

Dated at ————————————, this ———————— day of ————————————, 19 ————.
(Signature) ————————————————————————

NO. 4 PETITION FOR LEAVE TO INTERVENE[7]

Before the Interstate Commerce Commission

PETITION

————————————————

[v.] Docket No. ————————

————————————————

(or state other title)

Comes now your petitioner, ———————————————— ————————, and respectfully represents that he has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I. That [petitioner should here state nature and place of business, and whether as corporation, firm, or partnership, etc., as in form No. 1]

II. [Petitioner should here set out specifically his position and interest in the proceeding.]

III. [If affirmative relief is sought see paragraphs III and X and prayer in form No. 1.]

Wherefore said ———————————————— prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral arguments, if oral argument is granted.

[If affirmative relief is sought insert appropriate prayer here.]

Dated at ————————————————, 19 ————

[See forms Nos. 1 and 3 as to subscription, verification, and certificate of service.]

NO. 5. FORM OF REPARATION STATEMENT UNDER RULE 95

Claim of———— under decision of the Interstate Commerce Commission in Docket No. ————————————————

---

[6] See rule 20.

[7] See rule 71.

Date of shipment	Date of delivery or tender of delivery	Date charges were paid	Car[1] initials	Car[2] number	Origin	Destination	Route	Commodity	Weight	Rate	Amount	Rate	Amount	Reparation on basis of the Commission's decision	Charges paid by[1]

Claimant hereby certifies that this statement includes claims only on shipments covered by the findings in the docket above described and contains no claim for reparation previously filed with the Commission by or on behalf of claimant or, so far as claimant knows, by or on behalf of any other person, in any other proceedings, except as follows: (Here indicate any exceptions, and explanation thereof).

____
Claimant

By____________________________
Practitioner

____
Address

____
Date

Total amount of reparation $ ——————————————————

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct.

Date ——————Concurred[5] in: ——————————

Company——————————————————————Company, Defendant Collecting Carrier, Defendant.[4]

By ——————————————, Auditor. By ——————————————, Auditor.

---

[1] Substitute "Vessel" if water carrier involved.

[2] Substitute "Voyage No." if water carrier involved.

[3] Here insert name of person paying charges in the first instance, and state whether as consignor, consignee, or in what other capacity.

[4] If not a defendant, strike out word "defendant."

[5] For concurring certificate in case collecting carrier is not a defendant.

NO. 6. VERIFICATION FOR STATEMENTS OF FACT FILED UNDER MODIFIED PROCEDURE[6]

STATE OF ——————————————,

ss:

County of——————————————,

——————————being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted therein, and that the same are true as stated.

(Signed) ——————————————

Subscribed and sworn to before me this ——————————————— day of ———————————————————————

Notary Public of————————————————.

My Commission expires——————————.

NO. 7. NOTICE OF FILING OF APPLICATION FOR PUBLICATION IN FEDERAL REGISTER UNDER SECTION 205(a)(6) OF THE INTERSTATE COMMERCE ACT, AS AMENDED

(See instructions)

PART I

(To be completed by applicant)

Notice is hereby given that the below named applicant has filed with

————————————————————————————————

(Name of State Commission)

---

[6] See rule 48.

an application for a certificate to conduct motor common carrier operations in intrastate commerce; that, in connection with such operations, applicant also is seeking authority to engage in transportation in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations which may be authorized to be conducted; and that the intrastate and interstate operations proposed to be conducted are as set forth below.

1. ______________________________

(Name and business address of applicant)

____

(Street) (City) (State)

2. ______________________________

(Name and address of applicant's representative, if any)

____

(Street) (City) (State)

3. Describe below in full the operations proposed to be conducted in intrastate commerce, together with the extent to which applicant is seeking authority in connection with such intrastate operations to engage in transportation in interstate and foreign commerce. (If additional space is necessary, use reverse side.)

____

(Signature)

____

(Title)

Date ______________________ 19 ______

PART II

(To be completed by State Commission)

Date of filing application ______________________________

Docket number assigned ______________________________

Date and time and place application has been assigned for hearing, if known

____

____

(Signature)

____

(Title)

____
(Name of State commission)

Date this notice forwarded to Interstate Commerce Commission, Washington, D.C. 20423, ____ 19

INSTRUCTIONS

This form is for use in giving notice to interested persons regarding the filing of intrastate motor carrier applications in connection with which the applicant also desires authority to engage in interstate and foreign commerce pursuant to section 206(a)(6) of the Interstate Commerce Act, as amended October 15, 1962, by Public Law 87-805. It should be filed in duplicate (along with the intrastate application) with the State Commission, which will forward it to the Interstate Commerce Commission, Washington, D.C. 20423.

The description in part I, item 3 should include the commodities (or passengers) sought to be transported, the point to be served, and the routes over which, or territories within which, such transportation is to be performed. Care should be taken to insure that the description, which will be published in the Federal Register, fully informs interested persons of the type and scope of the proposed intrastate operations, and the extent to which applicant desires authority to engage in transportation in interstate and foreign commerce in connection with such intrastate operations.

APPENDIX C—EX PARTE COMMUNICATIONS

1. *Ex Parte communications.*—(a) No person who is a party to, or counsel or agent of a party, or who intercedes in, any on-the-record proceeding, shall submit any ex parte communication concerning the merits of the proceeding to any member of the Commission, hearing officer, member of a joint board, or to any employee of the Commission participating or who may reasonably be expected to participate in the decision in such proceeding.

(b) No member of the Commission, hearing officer, member of a joint board, or employee of the Commission participating or who may reasonably by expected to participate in the decision in such proceeding shall invite or knowingly entertain any prohibited ex parte communication, or make any such communication to any party to, or counsel or agent of a party, or any other person who he has reason to know may transmit such communication to a party or party's agent.

2. The prohibitions of paragraph 1 apply from the time an on-the-record proceeding is noticed for oral hearing or the taking of evidence by modified procedure, at such time as the person responsible for the communication has knowledge that the proceeding will be so noticed, or from such earlier time as the Commission may fix by rule or order in the particular case.

3. For the purposes hereof:

(a) "On-the-record proceeding" means a proceeding described in sections 556-557 of the Administrative Procedure Act (5 U.S.C. 556-557) or a proceeding required by the Constitution, by statute, by Commission rule, or by order in the particular case, to be decided solely upon the record made in a Commission hearing.

(b) "Person who intercedes in any proceeding" means any individual outside the Commission (whether public or private life), partnership, corporation, or association, other than a party or an agent of a party, who volunteers a communication which he may be expected to know may advance or adversely affect the interest of a particular party or any part's agent.

(c) "Ex parte communication concerning the merits" includes both oral and written communications, but the following classes of ex parte communication shall not be prohibited:

(1) Any oral or written communication which all the parties to the proceeding agree, or which the Commission, the hearing officer, or joint board formally rules, may be made on an ex parte basis.

(2) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive issue in a pending on-the-record proceeding in which he is interested.

(3) Any communication by means of any new medium which in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publications with respect to pending on-the-record proceedings.

(d) "Any employee of the Commission participating in the decision" includes personal assistants to members of an employee review board appointed pursuant to Public Law 87-247 (1961) to whom the proceeding may be referred for decision, employees of the Commission's Office of Proceedings, employees of the Rail Services Planning Office, and the staff of the General Counsel's Office.

4. Any member of the Commission, hearing officer, member of a joint board, or employee of the Commission, participating or who reasonably may be expected to participate in the decision, who personally receives a written communication which he believes is prohibited at the time received, shall promptly transmit the written communication, or a written summary of the substance of an oral communication, together with a written statement of the circumstances under which the communication was made, if not apparent from the communication itself, to the Secretary of the Commission, who shall place any material so received in the correspondence section of the public docket of the proceeding. Any such person who receives a communication and who is not certain whether such communication is a prohibited ex parte communication may request, and shall be given promptly, a ruling on the question from the Commission's General Counsel. The Chairman of the Commission shall be notified promptly of all reports of ex parte communications, or requests for rulings on possible ex parte communications, transmitted to the Secretary or the General Counsel. He may require that any such communication be placed in the correspondence section of the docket if he concludes that the dictates of fairness require that it be made public, even if it is not prohibited communication, and he may direct the taking of such other or further action as may be appropriate under all the circumstances.

5. The Commission may censure, or suspend or revoke the privilege to practice before the agency, of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication.

6. To the extent permitted by law, the relief or benefit sought by a party to a proceeding may be denied if the party, or an agent of the party, knowingly and willfully violates the foregoing prohibitions or requirements.

7. The commission may censure, suspend or dismiss, or institute proceedings for the suspension or dismissal of, any Commission employee who knowingly and willfully violates the foregoing prohibitions or requirements.

APPENDIX D—ATTORNEYS-QUALIFICATION

I, ______________________________

(Name)

____

(Address) (Telephone No.)

hereby declare that I am an attorney at law qualified as a member in good standing of the bar of the highest court of the ______________________________

____

(Signature)

APPENDIX E—INDEX OF THE SPECIAL RULES CONTAINED IN PARTS 1101-1159

PARTS 1101-1109-RULES OF PRACTICE

PART	
1101	Temporary operating authorities and approvals.
1102	Procedures governing rail carrier general increase proceedings.
1104	Procedures to be followed in motor carrier revenue proceedings.
1107	Requirements and procedures relating to Railroad Rate Adjustment Act of 1973.
1108	Revised Guidelines for Implementation of the National Environmental Policy Act of 1969.

PARTS 1110-1119—RAIL CARRIERS CONSOLIDATION, FINANCE, AND REORGANIZATION

1110	General requirements.
1111	Railroad and water carrier consolidation procedure.
1112	Interlocking officers.
1113	Guaranty of loans to carriers by railroad.
1114	Alteration or modification of securities and the provisions of instruments, and filing of certificates and reports.
1115	Issuance of securities, assumption of obligations, and filing of certificates and reports.
1116	Recordation of documents.
1117	Reorganization of railroads.
1118	Corporate reorganization of carriers and corporations.

PARTS 1120-1129—SPECIAL PROCEDURES; RAIL CARRIERS CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

1120	Construction, extension, acquisition, or operation of railroad lines.
1121	Abandonment of railroad lines.
1122	Discontinuance or change of operation or service.

1123	Determination of avoidable losses.
1124	Regulations governing the adequacy of intercity railroad passenger service.
1125	Standards for determining rail service continuation subsidies.
1126	Submission of cost data to justify reimbursement for directed service.

PARTS 1130-1139—SPECIAL PROCEDURES; MOTOR CARRIERS AND BROKERS CERTIFICATES, PERMITS LICENSES

1130	Applications for motor carrier certificates and permits.
1131	Temporary authority applications under section 210a(a) of the Interstate Commerce Act.
113a	Temporary authority applications under section 311(a) of the Interstate Commerce Act.
1132	Transfer of operating rights.
1133	Transfers of Passenger Brokers' Licenses.
1134	Control or consolidation of motor carriers or their properties.
1135	Corporate reorganizations of motor carriers.

PARTS 1140-1149—SPECIAL PROCEDURES; WATER CARRIERS

1140	Extensions of operations.
1141	Transfer of certificates and permits to operate.

PARTS 1150-1159—SPECIAL PROCEDURES; FREIGHT FORWARDERS

1150	Applications for permits.
1151	Transfers of operating rights (permits)

APPENDIX F

Number of copies of documents (In addition to original) to be filed with the Commission

Type of Document	Citation	Number of copies Original plus:
Applications—finance matters		
Competitive Bidding Requirements—Exemption	49 CFR 1115.25 (49 CFR 1110.7)	Six (6)
Interlocking Officers—Approval	49 CFR 1112.7	Six (6)
Rail Line—Abandonment	49 CFR 1121.4(a)	Six (6)
Rail Line—Construction, Extension, Acquisition or Operation	49 CFR 1121.2(b)	Nine (9)
Rail or Ferry Line—Discontinuance or Change of Service	49 CFR 1121.8	
(If by Notice)		Eight (8) of Notice Seven (7) of Statements
(If by Petition)		Seven (7)
Railcarriers—Guaranty Loans	49 CFR 1113.4(c)	Six (6)
Railroad Consolidation	49 CFR 1111.4(b)	Five (5)
Railroad Reorganization	49 CFR 1117.12(b)	Six (6)
Securities Issuance, Assumption of Obligations	49 CFR 1115.3(e) (49 CFR 1110.7)	Six (6)
Securities or Instruments—Alteration or Modification	49 CFR 1114.3(b)	Six (6), plus one (1) for governor of each State in which applicant operates.

APPENDIX F

Number of copies of documents (In addition to original) to be filed with the Commission

Type of Document	Citation	Number of copies Original plus:
Applications—water carrier and freight forwarder		
Certificate of Exemption—Water Carrier (Form OP-WC-10	(49 CFR 1003.2)	One (1)
Exemption by Contract Carriers—by Water (Form BWC-1)	(49 CFR 1003.2)	One (1)
Extension of Operations (Form OP-WC-20)	49 CFR 1140.1(b) (49 CFR 1003.3)	One (1)
Freight Forwarder Permit (Form OP-FF-10)	49 CFR 1150.1 (49 CFR 1003.3)	One (1)
New Certificates and Permits (Form OP-WC-20)	49 CFR 1140.1(b) (49 CFR 1003.2)	One (1)
Transfer of Water Carrier Certificates and Permits	49 CFR 1141.6(b)	Four (4)
Transfer of Freight Forwarder Permit	49 CFR 1151.5(b)	Four (4)
Applications—other		
Fourth Section	Rule 200	Six (6) Fourteen (14) if Div. 2 matter.
Released Rates	Rule 225(e)	Six (6)
Special Permission	Rule 225(e)	Six (6)
Section 5a. (Forms OP-F-44 and OP-F-45)	49 CFR 1134.1(b) & 1134.50(b) (49 CFR 1003.1)	Five (5)

APPENDIX F

Number of copies of documents (In addition to original) to be filed with the Commission

Type of Document	Citation	Number of copies Original plus:
Applications—Motor carrier and broker		
Acquisition of Control. (Form OP-F-45)	(49 CFR 1134.50(b) (49 CFR 1003.1)	Five (5)
Brokers of Passengers—License. (Form OP-OR-11)	(49 CFR 1003.1)	None
Brokers of Property—License (Form OP-OR-11)	(49 CFR 1003.1)	Do.
Certificate of Exemption. (Form OP-OR-110)	(49 CFR 1003.1)	Do.
Certificate of Registration (Form OP-OR-100)	49 CFR 1047.10 (49 CFR 1003.1)	Do.
Motor Carrier—Certificate or Permit. (Form OP-OR-9)	49 CFR 1130.1(b) (49 CFR 1003.1)	One (1)
Merger, Consolidation, Purchase, or Lease. (Form OP-F-44)	(49 CFR 1134.1(b) (49 CFR 1003.1)	Five (5)
Rental Contract Approval—Contract Carrier. (Form BOp 79)	(49 CFR 1003.1)	Three (3) plus three (3) of rental contract.
Temporary Authority (Form OP-MCB-95)	49 CFR 1131.2(b) (49 CFR 1003.1)	Six (6)
Temporary Operation (Form OP-F-46)	49 CFR 1134.6(b) (49 CFR 1003.1)	Five (5)
Transfer or lease of Certificate of Registration (Form OP-M-110).	49 CFR 1132.12(b) (CFR 1003.1)	Four (4)
Transfer or Lease of Operating Rights or Broker License (Form OP-M-100).	49 CFR 1132.2 (49 CFR 1003.1)	Four (4)

APPENDIX F

Number of copies of documents (In addition to original) to be filed with the Commission

Type of Document	Citation	Number of copies Original plus:
Pleadings and other documents		
Admission, Requests for	Rule 6(a)	One (1) *(copy* only)
Answers to Requests for Admissions		One (1) *(copy* only)
Administrative Appeals, Petitions for Stay	Rules 97 & 98	Six (6)
General Transportation Importance—Petitions	Rules 97 & 98	Fourteen (14)
Employee Board Action—Petition for Reconsideration	Rule 225(e)	Six (6)
Suspension and fourth-section matters—Petition for Reconsideration.	Rule 200(5)	Six (6), Fourteen (14) if Div. 2 matter.
Investigation into discontinuance—Order instituting or decision not to investigate—Petition for Reconsideration.	Rule 245(g) Rule 245(h)(3)	Six (6)
Bankruptcy proceedings—Various pleadings	Rule 14	Six (6)
Complaints—Formal	Rule 24(a)	Six (6) copies plus one (1) for each defendant to be served. If State-made rates involved one (1) additional copy for each State concerned.

APPENDIX F

Number of copies of documents (In addition to original) to be filed with the Commission

Type of Document	Citation	Number of copies Original plus:
Pleadings and other documents—Continued		
Complaints—Informal—Not Seeking damages	Rule 22(a)	One (1)
Complaints—Informal—Seeking damages	Rule 23(d)	One (1) for each defendant to be served.
Complaints—Answers	Rule 33(c)	Six (6) copies
Complaints—Satisfaction	Rule 35	None
Depositions	Rule 62	One (1) plus One (1) copy of exhibits.
Exhibits	Rule 82(c)	One (1) copy; plus one (1) copy for each counsel and each board member.
Interrogatories—Written	Rule 60(a)	One (1) *(copy* only)
Interrogatories—Answers to	Rule 60(a)	One (1) *(copy* only)
Intervention Petitions	Rule 70(d)	Three (3)
Intervention Petitions—At Oral Hearing	Rule 70	One (1) plus one (1) for each party represented. If granted, one (1) for Commission.
Modified Procedure—Verified Statements—In General	Rule 50	Six (6)
Modified Procedure—Verified Statement—Applications	Rule 247(e)(3)	One (1)
Prepared Statements—Oral hearing	Rule 75	Copy for reporter, and one (1) for each counsel.

APPENDIX F

Number of copies of documents (In addition to original) to be filed with the Commission

Type of Document	Citation	Number of copies Original plus:
Pleadings and other documents—Continued		
Protests—General	Rule 38(c)	Six (6)
Protests—Motor Carrier Finance	Rule 240(c)(1)	One (1)
Protests—Investigation and Suspension Proceedings	Rule 40(d)	Six (6)
Protests—Motor Carrier, Broker, Water Carrier, Freight Forwarder Applications.	Rule 247(d)(1)	One (1)
Oral Argument Matters	Rule 93	None
Replies to Pleadings	Rule 21(c)	Same number as pleading replied to.
Subpena Requests	Rule 54	None
Time Modification—Requests for Extension	Rule 19(b)	None
Transcript Correction	Rule 88(b)	Two (2) for reporter

461A

APPENDIX G

Commission hearing and appellate procedure

SEC. 303. (a) Section 17 of the Interstate Commerce Act (49 U.S.C. 17) is amended by redesignating paragraphs (9) through (12) thereof as paragraphs (10) through (13) thereof, respectively, and by inserting therein the following new paragraph (9):

(9)(a) Whenever the term hearing is used in this part, such term shall be construed to include an opportunity for the submission of all evidence in written form, followed by an opportunity for briefs, written statements, or conferences of the parties, such conferences to be chaired by a division, an individual Commissioner, an Administrative Law Judge, an employee board, or any other designated employee of the Commission.

"(b) With respect to any matter involving a common carrier by railroad subject to this part, whenever the Commission assigns the initial disposition to any such matter before the Commission to an Administrative Law Judge, individual Commissioner, employee board, or division or panel of the Commission, such judge, Commissioner, board, division, or panel shall—

"(i) complete all evidentiary proceedings with respect to such matter within 180 days after its assignment; and

"(ii) with respect to any matter so assigned which involves written submissions or the taking of testimony at a public hearing, submit in writing to the Commission, within 120 days after the completion of all evidentiary proceedings, an initial decision, report, or order containing—

"(A) specific findings of fact;

"(B) specific and separate conclusions of law;

"(C) a recommended order; and

"(D) any justification in support of such findings of fact, conclusions of law, and order.

The Commission, or a duly designated division thereof, may, in its discretion, void any requirement for an initial decision, report, or order, and, in appropriate cases, may direct that any matter shall be considered forthwith by the Commission or such division, if it concludes that the matter involves a question of agency policy, a new or novel issue of law, or an issue of general transportation importance, or if the due and timely execution of its functions so requires. Whenever an initial decision, report, or order is submitted, copies thereof shall be served upon interested parties. Any such party may file an appeal with the Commission, with respect to such initial decision or report. If no such appeal is filed within 20 days after such service, or within such further period (not to exceed 20 days) as the Commission, or a duly designated division thereof, may authorize, the order set forth in such initial decision or report shall become the order of the Commission and shall become effective unless, within such period, the order shall have been stayed or postponed by the Commission pursuant to subdivision (d) or (e).

"(c) The Commission, or a duly designated division thereof, may, upon its own initiative, and shall, in any case in which an appeal is filed under subdivision (b), review the matter upon the same record or upon the basis of a further hearing. Any such appeal shall be considered and acted upon by the Commission, or a duly designated division thereof, within 180 days after the date on which such appeal is filed. Any such decision, report, or order shall be stayed pending the determination of such appeal. Such a review shall be conducted in accordance with section 557 of title 5, United States Code, and such rules (limiting and defining the issues and pleadings upon review) as the Commission may adopt in conformance with section 557(b) of such title 5. The Commission may, in its discretion and on such terms and conditions as it may prescribe, authorize duly designated employee boards to perform functions under this paragraph of the same character as those which may be performed by a duly designated division of the Commission (other than the decision of any appeal under this paragraph which may be further appealed to the Commission).

"(d) Any decision, order, or requirement of the Commission, or of a duly designated division thereof, shall become effective 30 days after it is served on the parties thereto, unless the Commission provides for such decision, order, or requirement, or any applicable rule, to become effective at an earlier date. Any interested party to a decision, order or requirement of a duly designated division of the Commission may petition the Commission for rehearing, reargument, or other reconsideration, subject to such rules and limitations as the Commission may establish. If the Commission finds that a decision, order, or requirement presents a matter of general transportation importance, or if it finds that clear and convincing new evidence has been presented or that changed circumstances exist which would materially affect such decision, order, or requirement, the Commission may reconsider such decision, order, or requirement, and it may, in its discretion, stay the effective date of such decision, order, or requirement. If the Commission reconsiders a decision, order, or requirement, it must complete the process and issue its final order not more than 120 days after the date on which it grants the application for reconsideration.

"(e) The Commission may, in its discretion, extend any time period set forth in this section for a period of not more than 90 days, if a majority of the Commissioners, by public vote, agree to such extension. The Commission shall submit an annual report in writing to each House of Congress setting forth each extension granted pursuant to this subdivision (classified by the type of proceeding involved), and stating the reasons for each such extension and the duration thereof.

"(f) In extraordinary situations in which an extension granted pursuant to subdivision (e) is not sufficient to allow for completion of necessary proceedings, the Commission may, in its discretion, grant a further extension if—

"(i) not less than 7 of the Commissioners, by public vote, agree to such further extension; and

"(ii) not less than 15 days prior to expiration of the extension granted pursuant to subdivision (e), the Commission reports in writing to the Congress that such further extension has been granted, together with—

"(A) a full explanation of the reasons for such further extension;

"(B) the anticipated duration of such further extension;

"(C) the issues involved in the matter before the Commission; and

"(D) the names of personnel of the Commission working on such matter.

"(g) The Commission may, at any time upon its own initiative, on grounds of material error, new evidence, or substantially changed circumstances—

"(i) reopen any proceeding;

"(ii) grant rehearing, reargument, or reconsideration with respect to any decision, order, or requirement; and

"(iii) reverse, modify, or change any decision, order, or requirement.

The Commission may establish rules allowing interested parties to petition for leave to request reopening and reconsideration based upon material error, new evidence, or substantially changed circumstances.

"(h) Notwithstanding any other provision of this act, any decision, order, or requirement of the Commission, or of a duly designated division thereof, shall be final on the date on which it is served. A civil action to enforce, enjoin, suspend, or set aside such a decision, order, or requirement, in whole or in part, may be brought after such date in a court of the United States pursuant to the provisions of law which are applicable to suits to enforce, enjoin, suspend, or set aside orders of the Commission.

"(i) Notwithstanding the provisions of paragraphs (5), (6), (7), and (8), the provisions of this paragraph shall govern the disposition of, and shall apply only to, any matter before the Commission which involves a common carrier by Railroad subject to this part, except that the provisions of other sections of this part pertaining to deadlines in Commission proceedings shall govern to the extent that they are inconsistent with the provisions pertaining to deadlines contained in this paragraph.

"(j) Reports in writing and other written statement (including, but not limited to, any report, order, decision and order, vote, notice, letter, policy statement, rule, or regulation) of any official action of the Commission (whether such action is taken by the Commission, a division thereof, any other group of Commissioners, a single Commissioner, an employee board, an Administrative Law Judge, or any other individual or group of individuals who are authorized to take any official action on behalf of the Commission) shall indicate (i) the official designation of the individual or group taking such action, (ii) the name of each individual taking, or participating in taking, such action, and (iii) the vote or position of each such participating individual. If any individual who is officially designated as a member of a group which takes any such action does not participate in such action, the written statement of such action shall indicate that such individual did not participate. Each individual who participates in taking any such action shall have the right to express his individual views as part of the written statement of such action. The written statement of any such action shall be made available to the public in accordance with Federal law."

(b) Section 17 of the Interstate Commerce Act is amended by inserting therein a new paragraph (14) as follows:

"(14)(a) Any formal investigative proceeding with respect to a common carrier by railroad which is instituted by the Commission after the date of enactment of this subdivision shall be concluded by the Commission with administrative finality within 3 years after the date on which such proceeding is instituted. Any such proceeding which is not so concluded by such date shall automatically be dismissed.

"(b) Within 1 year after the date of enactment of this subdivision, the Commission shall conclude or terminate, with administrative finality, any formal investigative proceeding with respect to a common carrier by railroad which was instituted by the Commission on its own initiative and which has been pending before the Commission for a period of 3 or more years following the date of the order which instituted such proceeding.".

No. 36508

MIDWEST FREIGHT CAR COMPANY—PETITION FOR DECLARATORY ORDER—SWITCHING CHARGES AT CLINTON, ILLINOIS

Decided August 5, 1977

Upon petition for declaratory order, switching charges collected and sought to be collected on delayed movements of empty freight cars to a repair shop found applicable, and not shown to be unjust and unreasonable, or otherwise unlawful. Settlement agreement between parties on certain switch and weigh movements approved. Proceeding discontinued.

Thomas F. McFarland, Jr., and *Harold E. Spencer* for petitioner.
John H. Doeringer for respondent.
James E. Armstrong and *Dellon E. Coker* for intervener in support of petitioner.

REPORT AND ORDER OF THE COMMISSION

REVIEW BOARD NUMBER 4 MEMBERS FITZPATRICK, SHAW, AND FISHER

BY THE BOARD:

The modified procedure was followed. Pursuant to section 17(9)(b) of the Interstate Commerce Act, the proceeding has been assigned to this board for initial disposition. Requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for the proper disposition of the proceeding.

On November 17, 1976, the Illinois Central Gulf Railroad (ICG) filed an action at law in the Circuit Court of Cook County, Illinois, Law Division, No. 76L 21052, seeking to recover $41,421.14 for switching service rendered petitioner Midwest Freight Car Company (Midwest) at Clinton, Ill., between April 3, 1973, and February 11, 1976. On December 20, 1976, Midwest filed an answer and a counterclaim in that action seeking recovery of $36,385.10 in charges paid to the railroad for switching at Clinton between November 17, 1973, and October 28, 1976. Subsequently, Midwest filed a petition for a declaratory order pursuant to a referral order from the court of January 4, 1977, requesting this Commission to determine:

> (1) whether or not the switching charges involved in the complaint and counterclaim were applicable to the switching services referred to therein under section 6 of the Interstate Commerce Act, and
> (2) whether or not these switching charges, if applicable to such services, were just and reasonable as applied thereto, under section 1 of the Interstate Commerce Act.

By notice published in the Federal Register, the Commissio.. requested comments from interested parties concerning the issues raised in the petition. Pursuant thereto the Secretary of the Army on behalf of the Department of Defense (DOD) was granted leave to intervene and filed a statement of position in support of petitioner.

Midwest is an Illinois Corporation which maintains a freight car manufacturing, modification and repair plant within the switching limits of Clinton, Ill. Its facility is served solely by ICG, whose predecessor corporation had used the site as a rip (repair) track for minor car repair operations. Midwest leased the site and added buildings and equipment, as required for its present operations. Its customers include railroads, Trailer Train Company (Trailer Train) (a car company owned by the railroads), freight car holding companies, and private car owners and shippers.

By lease dated October 10, 1972, retroactively effective to August 1, 1972, Midwest leased approximately 11 acres of land and certain trackage from the ICG within the Clinton switching zone for its operations. It maintains rip tracks which are located between yard A and yard B of the ICG switching terminal and asserts that it has leased tracks number 14 and 15 near yard B for storage.

During the first 3 years of Midwest's operation at Clinton, no charges were assessed against it for the switching operations which are the subject to the instant dispute. However, in 1973, the ICG began to bill Midwest for these movements. Under protest, Midwest has paid a portion of the charges assessed.

Petitioner alleges that the switching charges collected and those sought to be collected are inapplicable to the subject traffic, or if applicable, are in violation of section 1(6) of the act. It also points out that those charges accruing prior to November 17, 1973, are barred by the 3-year period of limitations contained in the act since the ICG did not file its claim in the Illinois court until November 17, 1976.

The charges in controversy herein are derived from two distinct types of switching movements performed for Midwest by the ICG. The first type of movement has been termed by the petitioner as "temporarily-interrupted repair movements." These movements involve freight cars of railroad, Trailer Train or private ownership which could not be spotted upon arrival because Midwest's receiving track was full. These cars were held on ICG's yard tracks and later were switched to Midwest's rip track number 1 which is the receiving and dispensing track of the repair facilities. The cars on which charges are sought to be collected were held on the ICG's yard tracks for varying periods said to range from a few hours to a few days time.

Midwest alleges that these cars should have been delivered to its leased storage tracks Nos. 14 and 15 near yard B which were capable of holding 32 freight cars and total approximately 1,700 feet in length. However, the record does not indicate whether Midwest ever instructed the railroad to spot such cars on its so-called storage tracks or how these cars would have been moved later to its receiving track. Midwest states it received no benefit from the ICG's detention of the cars on the railroad's yard tracks rather than the leased tracks and denies ever directing the storage of cars on tracks other than those it leased. It also points out that all of the involved switching movements took place within the switching limits of Clinton, Ill., and that each had a preceding or subsequent movement in interstate commerce.

The second type of movement involved herein has been termed "switch and weigh" movements. These consist of the transfer of newly constructed or rebuilt freight cars (hereinafter called new cars) from Midwest's rip track number 1 to the ICG's scale for weighing and movement to ICG's yard A, a distance of no more than one-eighth mile, at which point Midwest's personnel stencil the tare weight obtained onto the cars. This process involves approximately 15 minutes per car. At the completion of this operation the car is ready for its line-haul movement to the purchaser.

Midwest states it has paid all charges which have been assessed by the ICG for the weighing operation. Those charges are not at issue in this controversy. However, Midwest asserts that no tariff authority exists for the collection of any switching charges which have been billed to it on the "switch and weigh" movements.

By joint petition filed May 6, 1977, both parties ask the Commission to approve a mutually agreed upon settlement in the amount of $7,230 on the "switch and weigh" movements at issue. This settlement is based upon a new tariff item effective May 30, 1977.

Respondent concedes that the statutory period of limitations prohibits collection of any charges which accrued before November 17, 1973, 3 years from the date of filing of its civil action in the circuit court of Cook County.

ICG states it is willing to waive collection of $2,139.58 for switching service performed on inbound railroad-owned cars and to allow the $2,724.29 paid by petitioner on these movements to be credited on presently outstanding claims.

ICG also admits that the inbound movement of Trailer Train cars were handled directly for Trailer Train under contract on and after May 1, 1974, and abandoned its claim for charges of $4,479.61, against Midwest for such movements which occurred on or after this date. Respondent agreed to credit the $1,910.48 already paid for these movements against its remaining claims.

The remaining issues involve charges on the movement of (1) inbound private cars, (2) inbound Trailer Train cars from November 17, 1973 to before May 1, 1974, and (3) so-called switch and weigh movements of outbound cars on which the parties hereto have reached agreement for past and future services.

Respondent acknowledges the general principle that private cars move to and from repair points free of charge. However, it maintains that the charges sought herein are authorized by the provisions of item 185 of ICG Tariff 1-G, ICC A-12191, effective September 1, 1972. This tariff specifically provides charges applicable on movements of empty private cars to and from repair plants which are not owned or operated by the owner of such cars in Illinois. The ICG maintains that this item applies to the delayed movement of empty cars from ICG yard tracks to the Midwest plant or from any leased track to the Midwest plant. Respondent states that Midwest orders cars on a daily basis to be moved from the Clinton yard into the Midwest plant, designating the cars to be moved by number.

With respect to Trailer Train cars moving prior to May 1, 1974, the respondent avers no special agreement was in effect concerning their movement but that they were moved as ordinary private cars and consequently are subject to the same charges as noted above with respect to private cars.

The ICG maintains that the tariff items covering switch and weigh operations are intraterminal switching charges which apply on switching services from an industry or side track to another industry or side track. Furthermore, respondent argues that these charges are based on weight and are a flat rate. Respondent accordingly dismisses Midwest's argument that the short distance and time involved should defeat these provisions since Midwest used the switching services to its benefit in "full view" of the tariff charges.

In reply, petitioner questions whether any charges can be assessed on private cars moving to and from repair facilities. It argues that line-haul freight rates on commercial shipments of property include compensation for all the services which the railroads are obliged to perform specifically including those costs arising from providing freight cars and maintaining their good repair. Th. principle, Midwest asserts, is embraced in the traditional principles of ratemaking and is reflected in Rail Form A which is used for the purpose of ascertaining rail costs associated with rate proposals. Specifically included therein are recommended factors for estimating empty mileage on privately owned cars, including allowances based on Commission studies for the empty movements of such cars from and to repair plants. Petitioner argues that the expenses incidental to nonrevenue switching movements are recovered in the rates charged on goods carried in private cars. It cites *City Ice Delivery Co.* v. *P. M. R. R. Co.*, 39 I.C.C. 589 (1916), and *Atchison Railway Company* v. *United States*, 232 U.S. 199 (1914) for the proposition that no additional charge should be made for a car movement which is necessary to a freight movement producing revenue for the railroads. Such a practice allegedly would constitute a double collection and would violate the provisions of section 1(6) of the act.

Midwest states that no cost is allocated to compensate private car owners for the empty movement of their cars to and from repair plants in determining mileage allowances paid by railroads for the use of private cars. It, therefore, questions the propriety of imposing a charge on such privately owned cars since such charges are not recovered by the car owners. This, it is argued, would violate section 1(11) of the act, citing in support *Tank Car Allowances, Southern Ry. System*, 329 I.C.C. 466, 479 (1967), and *Sioux City Term. Ry. Switching*, 241 I.C.C. 53, 64-65 (1940). It also argues that this Commission has rejected the imposition of switching charges on cars moving to or from repair facilities as violative of section 6(7) of the act on the basis that the cars are instrumentalities of transportation and ordinary repairs are an unavoidable incident of performing the carriers' transportation services, citing in support

Mileage Allowances, Tank Cars, 337 I.C.C. 23, 34, footnote 12 (1970), and *Union Tank Car Co. Terminal Service,* 268 I.C.C. 338, 341-42 (1947).

Petitioner denies that intraterminal switching charges are applicable on its switch and weigh movements. Such charges are applicable only on movements from one industry or plant facility to those of a different industry or plant facility, *Mitsui & Co.* v. *Director General,* 81 I.C.C. 489 (1923). Absent an applicable charge on these movements, Midwest maintains that no charges may be collected, citing *Baker* v. *Prolerized Chicago Corporation,* 335 F. Supp. 183 (N.D. Ill. E.D. 1971).

Midwest also argues that no switching charges should be collected on these short switching operations since the line-haul movement which follows this operation provides adequate compensation, citing in support, *Cancellation Terminal Charges at Decatur, Ill.,* 277 I.C.C. 57 (1950).

DOD, through the Military Traffic Management Command, controls and directs the operations of the Defense Freight Railway Interchange Fleet (DFRIF) which consists of approximately 4,000 railcars registered for interchange service. These DFRIF cars are moved by rail carriers, from time to time, to various nonrailroad owned facilities for cleaning and repair. No charges are assessed for this transportation when made in conjunction with a previous or subsequent line-haul movement.

DOD states that the issue before this board has recently been presented to the Commission in docket No. 36328, *Derby Tank Car and Manufacturing, Inc.* v. *L. & N. RR. Co.,* initial decision served December 17, 1976 (not printed), affirmed by decision and order of division 2, served July 1, 1977, and in docket No. 36379, *Charges for Moving Empty Private Tank Cars on Own Wheels,* report and order of division 2, served June 15, 1977 (not printed). Intervener alleges that these cases consitute a "piece-meal effort" by rail carriers to reverse the established practice of moving privately owned cars to repair or cleaning facilities without charge. If successful nationally, this practice would have a substantial, adverse monetary impact on DOD.

It is the position of DOD that movements of empty privately owned railcars for repair or cleaning are necessary, normal and unavoidable incidents to the performance of revenue transportation and are not required to bear costs as freight; that switching charges for such movements are included in the line-haul rate; and that a separate charge for switching such cars would constitute an unjust and unreasonable practice.

DOD further requests that the Commission undertake a rulemaking proceeding to establish a nationwide policy on the movement of empty, privately owned cars destined for repair and cleaning if the trend persists.

DISCUSSION AND CONCLUSIONS

The issues to be resolved in this proceeding have been significantly reduced by specific concessions and agreements of the parties. The ICG has dropped its claims on movements of Trailer Train cars occurring after May 1, 1974, on the basis of the agreement, noted above. It has abandoned the charges sought on the inbound movements of railroad-owned cars and has agreed to credit the amount already paid by petitioner for such movements to other outstanding claims. All remaining claims occurring before November 17, 1973, have been conceded to be barred by the statutory period of limitations contained in section 16(3)(a) of the act.

Midwest and the ICG also petition this Commission to accept the agreement approved by each to settle the claims relating to switch and weigh movements of new cars. This agreement is predicated on item 1027, in supplement 119 to ICG Tariff 1-G, effective May 30, 1977. The agreement provides tariff rules and charges applicable to switch and weigh movements and discounts the effect to ex parte increases which have resulted over the period of time during which the charges accrued. Deducting the amount already paid by Midwest to the ICG, a balance of $7,230 remains. We believe that this agreement represents a reasonable basis for settlement of this issue, and, therefore, it is approved for the following reasons.

First, respondent claimed authority for the disputed charges by virtue of item 455 series of ICG Tariff 1-G, ICC A-12191, which applies to intraterminal, industry-to-industry, loaded car switching. But in *Mitsui & Co.* v. *Director General, supra* at 490, under circumstances similar to those presented herein, division 3 found:

> The scales track was not a point of actual or constructive delivery. The mere fact that the cars were stopped at the scale long enough to be weighed makes that point no more a destination or "another track" than would be any point along the route at which, for operating reasons, cars might be momentarily stopped. There was no applicable rate in effect concerning movements such as these. Therefore, it is necessary to determine whether the charges collected were reasonable, and, if not, what charges would have been reasonable.

However, the ICG has performed a service for the benefit of Midwest on these new cars and is entitled to receive reasonable compensation therefor even absent an appropriate tariff provision, see *A. Levy & J. Zentner Co.* v. *Southern Pac. Co.*, 294 I.C.C. 767, 770 (1955); and *Harris* v. *Chicago, R. I. & P. Ry. Co.*, 268 I.C.C. 45, 48 (1947). Petitioner's reliance on *Baker* v. *Prolerized Chicago Corporation, supra,* is misplaced. There, the court found that the carrier's deviation from the appropriate tariff item precluded collection on the alternate basis of quantum meruit. Similarly, *Cancellation Terminal Charges at Decatur, Ill.*, 277 I.C.C. 57 (1950), and *Wickwire Bros., Inc., Terminal Allowance,* 274 I.C.C. 307 (1949), cited therein, are not applicable since in those cases, the weighing and spotting service was a necessary element to the determination of line-haul charges, which is not the case herein.

In *Twin Coach Corp.* v. *Erie R. Co.,* 203 I.C.C. 393 (1934), so-called "trackless trolley" cars were transported in boxcars from Kent, Ohio, to various points. It was found that there was no tariff authority for the assessment of line-haul charges. At the same time, the Commission noted it was the carrier's duty to impose, and the shipper's duty to pay, reasonable charges for the transportation services rendered. Reasonable charges found to be applicable for line-haul transportation were those established specifically for "trackless trolley" cars subsequent to movement.

Having determined that compensation is due respondent for the performance of this service and that no appropriate tariff item was in effect at the time the service was performed, we are of the opinion that the settlement proposed by the parties, based on new tariff charges presently in effect and which has been formulated to take into account previous ex parte increases, constitutes a reasonable basis for resolving this controversy.

The remaining issue is whether the respondent may legally impose switching charges on so-called temporarily interrupted movements of empty inbound private cars and Trailer Train cars.[1] No switching charges have been assessed on movements of privately owned cars which have been directly placed on Midwest's rip track number 1.

The respondent relies on item 185 of its Tariff 1-G, effective September 1, 1972, for authority to assess such charges. This item constitutes an exception to the private car mileage tariff and the applicable rate on the delayed switching service performed, provided it may legally be applied on the subject movements.

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[1] As noted above, the period in question with respect to Trailer Train cars is from November 17, 1973 to and including April 30, 1974.

The record shows that respondent is frequently unable to deliver a substantial number of cars at the designated rip track of Midwest. The delay involved in such movements cannot be considered as one of a temporary nature in that it is not unusual, infrequent or occasional but is recurring and subject to considerable duration, up to an unspecified number of days. Respondent is, therefore, required, for completion of the movement and for tender of the car to Midwest's repair facilities, to perform another switching operation from the site of storage to Midwest's rip track number 1. This movement would not be required but for the inability of Midwest to receive these cars when first tendered. It is apparent that these delays have a reoccurring cause inherent in Midwest's operation or in its plant or yard layout.[2]

Although certain switching operations are considered to be included in the line-haul mileage allowance tariff, these only include operations which are usual to effectuate the actual transfer of the car to the repair facilities. The switching operation considered herein falls outside the scope of normal, unavoidable and necessary movements required to repair a car so that it can be returned to the performance of revenue transportation service. Respondent derives no demonstrable economic benefit for such additional service and is accordingly entitled to receive compensation for this service. Compare the report and order of division 2 in ***General American Transportation Corporation, Union Tank Car Company, and North American Car Corporation,*** decided June 10, 1977 (not printed).

Petitioner advanced the proposition that collection of switching charges on these movements is prohibited by the provisions of section 6(7) of the act, citing ***Union Tank Car Co. Terminal Service, supra,*** and ***Mileage Allowance Tank Cars, supra.*** However, section 6(7) requires carriers not to engage in transportation services unless rates and regulations are filed and published in accord with the provisions of part I of the act and thereafter, strictly observed. This mandate does not prohibit or prevent the collection of charges except to the extent it refers to other appropriate provisions of the act. In ***Union Tank Car Co. Terminal Service, supra,*** the Commission rejected the prior determination by division 3, appearing at 264 I.C.C. 479, which would have required respondent railroads to refrain from providing free service on cars scheduled for repair by virtue of the prohibition against free service on property contained in section 6(7) of the act. In the later report, the Commission found that such cars did not fall under the provisions of section 6(7) since they were the instruments of transportation and not property within the meaning of that section. The Commission found that respondent railroads were not required to collect charges under section 6(7). This finding does not support petitioner's argument that the section makes it unlawful to collect charges on instrumentalities of transportation.

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[2] Although tracks 14 and 15 of yard B were under lease to Midwest, the record does not show that it provided instructions for the placement of cars on these tracks. It continued to designate rip track number 1 as the receiving point for cars in spite of its inability to accommodate such cars there, resulting in an irregular and inefficient requirement on respondent's switching operations.

Commissioner Patterson in his dissent to the report upon reargument in *Union Tank Car Co. Terminal Service, supra* at 343, noted that the decision did not reverse the principle set forth in *Corn Products Refining Co. Terminal Service,* 266 I.C.C. 181 (1946), "*** that if the delays or interferences are inherent in or arise repeatedly out of industrial operations or the inadequacy or complexity of plant tracks or facilities, switching charges in addition to the charges provided in the terminal tariff should be collected ***." Here, respondent requests compensation for only its extraordinary switching operation, and no attempt has been made to collect any charge for switching which is normally required for the repair, cleaning or maintenance of cars. Accordingly, we are of the opinion that the imposition of a separate charge is justified by the inability of petitioner to receive cars tendered under its established procedure and at its designated receiving track; that the additional switching operation cannot be considered as included in mileage allowance tariff provisions, and, therefore, these charges would not constitute a double collection of costs; and that respondent has specifically provided for a charge to be levied against such switching movements, which charge itself has not been challenged as unreasonably high.

We find, that the settlement of issues relating to switch and weigh movements and embraced in the joint petition filed May 6, 1977, should be approved; and that the charges collected and sought to be collected on delayed switching movements of private cars and Trailer Train cars are applicable, and not shown to be unjust and unreasonable, or otherwise unlawful.

And we further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Board Member Shaw did not participate in this decision.

It is ordered, That this proceeding be, and it is hereby, discontinued.

No. 36114

POTOMAC ELECTRIC POWER COMPANY v. PENN CENTRAL TRANSPORTATION COMPANY

(JOHN H. MCARTHUR, ROBERT W. BLANCHETTE, AND RICHARD C. BOND, TRUSTEES, ET AL.)

Decided September 20, 1978

Incorrect rate-cost comparison in prior decision found not to compel a change in the rate prescribed. Petition for limited and general reopening denied as unwarranted and in order to insure finality in the administrative process.

J. Raymond Clark and *Samuel M. Thomassen, Jr.* for complainant.

Charles C. Rettberg and *James R. Paschall* for Chessie System Lines.

DECISION

BY THE COMMISSION:

BACKGROUND

This proceeding arose upon complaint by the Potomac Electric Power Company (PEPCO) seeking the prescription of reasonable and lawful rates and rules as well as reparation for past collection of charges in excess of a reasonable basis for the transportation of bituminous steam coal in trainloads and unit-trains from eastern mines to three of PEPCO's electric generating stations located at Herbert (Chalk Point station), Woodzell (Morgantown station), and Dickerson (Dickerson station), MD.

In our report of April 1, 1977[1] we determined that, with the exception of the trainload rates to Dickerson station (Dickerson), the complainant had not shown that the trainload and unit-train rates which it assailed were unlawful. For the movement to Dickerson, we found that the rate-to-variable cost ratio was 246.6 percent, as compared with rate-to-variable cost ratios of 179.4 and 178.0 percent to Morgantown and Chalk Point, respectively. As the movements to each of these destinations involved the same commodity, we agreed with the complainant "that the rate-to-variable cost ratio with respect to Dickerson movements is excessive when compared with ratios to complainant's other generating stations."[2] Accordingly, we found that trainload rate on movements to Dickerson station unjust and unreasonable in violation of section 1(5) of the act.[3]

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[1] *Potomac Electric Power Co. v. Penn Central*, 356 I.C.C. 815 (1977).

In our report and order on further hearing of October 21, 1977, served October 28, 1977, we determined that rates for the trainload shipment of coal to Dickerson from base districts in the eastern region should not exceed 190 percent of the variable cost of service and prescribed a rate of $3.87[4] at the Ex Parte No. 305-A level.

On April 6, 1978, PEPCO filed a petition seeking a limited reopening of this proceeding to correct a factual error and to modify the report and order accordingly. It states that the Commission has throughout this proceeding compared the base district rate to average variable cost that included movements from both the base district and the more distant, higher cost, differential district. Complainant claims that this error was "directly productive"[5] of the precise rate prescribed from the base district, since the rate prescription was expressed in terms of a rate-to-variable cost relationship of 190 percent.

PEPCO argues that, since the rate was prescribed from the base district only, the higher costs attributable to movements from the differential district should have been eliminated from the cost study prior to the application of the prescribed rate-cost ratio. It asserts that the prescribed rate of $3.87 was "inappropriately calculated"[6] and requests that it be "recomputed"[7] to match the rate from the base district with the corresponding variable cost of service.

The Chessie System Lines (defendant or Chessie) has coupled its reply to PEPCO's petition with a petition of its own[8] for a general reopening based on increased costs due to significant change in the traffic pattern surrounding the shipment of coal to Dickerson.

These petitions will be considered in order.

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[2] 356 I.C.C. at 823.

[3] 356 I.C.C. at 828.

[4] Rates are stated per net ton, unless otherwise indicated.

[5] Complainant's "Petition for Limited Reopening for Modification of Report and Order to Correct Factual Error and to Conform Relief Granted to the Evidence of Record," filed April 6, 1978, p. 7.

[6] *Id.* at 3.

[7] *Ibid.*

[8] Filed April 25, 1978.

DISCUSSION AND CONCLUSIONS

I

PEPCO'S PETITION FOR LIMITED REOPENING

PEPCO is correct in stating that throughout the Commission's reports in this proceeding cost associated with movements from a point in the differential district were averaged with costs for shipments from the base district. This average cost was then compared with the base district rate.

However, the rate-cost comparison was used only to determine the reasonableness of the base district rate. That determination is not affected by PEPCO's suggested correction. The rate prescribed was not formulated exclusively upon variable costs. To the extent that cost were a factor in the prescription of that rate, use of the lower costs argued for by the complainant would not affect the rate set. Moreover, by its petition, complainant is attempting to impeach its own witness and to modify the record long after this proceeding has become administratively final. Its motion must be denied not only because the error it points to is not material, but also because there must be finality to the administrative process.

The error referred to by the complainant was initiated by PEPCO when, in its cost study, it included costs for cars from one mine in the differential district in the average costs which it then compared with the base district rate.[9]

PEPCO's calculation of variable costs was based on a 30-car sample. Five of the 30 cars used in the sample were from the Benjamine Mine in the higher rated West Virginia district. The remaining 25 cars were from mines in the base district. However, in none of the supporting exhibits[10] did complainant designate the Benjamine Mine as being in the differential district. Rather, it averaged the costs for cars from this mine with the costs for cars from all of the other mines in its sample and compared this average cost with the base district rate.[11]

The Commission's April 1, 1977 report in this proceeding made it clear that, with certain adjustments, it had accepted PEPCO's average costs and focused its attention, as had PEPCO in the rate-cost comparisons compared advanced in its cost study, on the rate from the base district.[12] Not only did PEPCO make no motion to reopen the record for introduction of evidence to correct the error it had made,[13] but, when suggesting reduced rate levels from the base district in the proceeding on further hearing, *it relied on the very cost which it now says it had earlier discovered were erroneous.*[14]

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[9] Exhibit 7, testimony of R. L. Hines, p. 35 (table No. 11); exhibit RLH-3, sheet No. 1.

[10] RLH-2 (sheet 5) and RLH-3 (sheet 4).

[11] See complainant's exhibits RLH-3 (sheet 1) and exhibit No. 7, p. 32 (table No. 11).

PEPCO suggests that the composite costs from the two origin regions might have been used to fix reduced rates from both the base and differential districts on a weighted average basis. However, it has not been demonstrated on this record that the costs relating to the Benjamine Mine movements are representative of the costs from the differential district. Further, in the reopened proceeding, PEPCO never referred to these costs as "composite" or suggested that they were for other than the base district. It did not use the term "weighted average" or propose that rates be made on a weighted average basis.[15] Indeed, in its pleadings on reopening, it once again contrasted its costs (as restated by the Commission) with the rate from the base district.[16]

Complainant continued its silence following service of the Commission's October 21, 1977 report and order on further hearing which referred to PEPCO's costs and again made it perfectly clear that the only rate to be prescribed was a base district rate of $3.87 per ton. PEPCO may not now be heard to complain of an error for which it was responsible and which it has maintained by both omission and commission.

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[12]

> *** we conclude that the trainload rate applicable to movement from various mines *in the base rate group* in question to Dickerson station is unjust and unreasonable in violation of section 1(5) of the act. [Emphasis supplied.]

Potomac Electric Power Co. v. *Penn Central*, 356 I.C.C. 815 (1977), served April 12, 1977, p. 823 and appendix B, pp. 835-836.

[13] Complainant states that in its brief to the Administrative Law Judge it separated the cost for the cars from the Benjamine Mine from those incurred on the 25 movements from the base district. However, briefs are not evidence. The rate-cost comparisons in this proceeding were determined upon the only *evidence* of record.

[14] See the verified statement of Charles W. Nicholason pp. 4-7 and exhibit No. 3; see the verified statement and argument of complainant in reopened proceeding, p. 22, where complainant pointed out that, under one of its proposals "*** the 5.02 rate found to be unreasonable would be reduced to $4.07 per ton, twice the Commission computed variable cost of $2.036 per ton." Once again PEPCO juxtaposed the base rate, $5.02, with the variable cost (as adjusted by the Commission) of $2.036 without so much as hinting that the variable cost might contain a cost component from the differential district.

[15] See the discussion of PEPCO's proposals in the October 1977 report and order in this proceeding, pp. 24-29.

[16] See footnote 14, *supra*.

Complainant apparently assumes that we prescribed the rate from the base district to Dickerson by application of randomly selected mathematical formula [190 percent of variable cost (203.6 cents)]. As we pointed out in our report and order of April 7, 1978,[17] this assumption is inaccurate. We there noted that:

> In our report and order of April 1, 1977, we found the Dickerson trainload coal rate unreasonable based on a comparision of rate-to-variable cost ratios with comparable shipments. For the sake of consistency, we expressed our prescription of the Dickerson rate in the same terms, i.e., a rate-to-cost relationship of 190 percent. However, our report is replete with explanation of those factors we considered in arriving at a rate of $3.87 for future trainload coal shipments to Dickerson.
>
> * * * * * * *
>
> In arriving at the rate we prescribed we considered the profit adduced from comparable movements by other carriers, examined the financial condition of the railroads transporting this traffic, and analyzed the costs related to the shipments under review. We were careful to accord the carriers a "benefit from the economies they have achieved through the introduction of trainload service" and allowed for the difference in the length of haul between the shipments being compared.
>
> We also studied the eastern coal rate pattern for any possible effect from our setting of a lower rate to Dickerson and found no reason to suppose that our prescription would have an unfavorable result upon the rate fabric as a whole.
>
> We carefully examined the alternatives proposed by the parties. We considered the growing demand for coal, its importance to this Nation as a "vital fuel," and the increasing amounts of this captive traffic which would be moving over Chessie's lines.
>
> Finally, we took into account the gross annual contribution which would be made to railroad revenues by the movement of substantial and growing volumes of utility coal and balanced this against the assistance furnished by the shipper in setting up facilities and operations which helped to make trainload service possible.
>
> Considering all of this we set a rate which returns to the carriers 117 percent of fully allocated cost. "This amounts to $5,127,750 *** a year on 1976 tonnage and can be expected to amount to a great deal more as the use of coal increases."
>
> Obviously, then, we did not randomly select a percentage of variable cost in prescribing the rate for trainload movements of coal from the base district to Dickerson ***."[18]

Were we to reopen the record, complainant's resassessment of the costs from the base district would not alter our rate prescription. True, this traffic is more remunerative to the carrier than previously thought, but this is because the economies it has achieved through the introduction of trainload service are greater than originally supposed. Chessie must be allowed to benefit from the efficiencies it has instituted in its operations. Again, though the assistance furnished by the shipper is obviously of greater benefit to the railroads than we had perceived, nevertheless, the carrier should be allowed a greater return for the shorter haul to Dickerson. Finally, the effect upon the eastern coal rate pattern of the rate selected for Dickerson is quite important to our prescription. For this reason we reopened this proceeding specifically to thoroughly consider that issue.[19] There is no evidence that the rate we have set for the trainload shipment of coal from the base district to Dickerson will have an adverse effect on the eastern coal rate fabric. PEPCO, on the other hand, has failed to present any evidence that the still greater rate reduction which it advocates will not seriously disrupt rate relationships.

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[17] Served April 17, 1978.

[18] *Potomac Electric Power Company* v. *Penn Central Transportation Company (John H. McArthur, Robert W. Blanchette, and Richard C. Bond, Trustees,* et al.) dated April 7, 1978, served April 17, 1978—mimeographed copy pp. 5-7—footnotes omitted).

Usually, complainant is under no obligation to indicate the effect of a rate reduction upon rate relationships. However, here PEPCO is attacking a rate which we have prescribed only after thoroughly considering the effect of our prescription upon the eastern coal rate pattern. In these circumstances, complainant must present some evidence as to the effect of a lower rate prescription upon existing rate relationships. This it has not done.

PEPCO's revelation of its costing error merely confirms our original judgment that the rate from the base district was unreasonably high.[20] As we have pointed out, cost was only one of the factors which we examined in setting the rate from the base district to Dickerson. Complainant's cost revision would not alter all of the other considerations which went into our determination of that rate. Our prescription stands.

As we explain in the next section of this report, this proceeding has been before us for almost 4 years. Complainant now seeks to change the testimony of one of its own witnesses long after this proceeding has become administratively final. Yet the modification it seeks to make would not alter the rate we have prescribed. Under these circumstances its request to amend its evidence must be denied in the interest of administrative finality. Accordingly, we decline to reopen the record in this proceeding.

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[19] Decision dated April 1, 1977, cited footnote 12, *supra* at 824 and 828.

[20] By complainant's revised calculations that rate produced a revenue-variable cost relationship of 294 percent.

II

CHESSIE'S PETITION FOR GENERAL REOPENING

Chessie states that the traffic pattern of coal shipments to Dickerson has changed significantly since PEPCO's 1974 cost study. Specifically, it represents that shipments from the differential district have almost doubled and that traffic interlined between the Western Maryland Railroad Company and the Baltimore & Ohio Railroad Company has increased from 1.9 percent to 32.9 percent. Although Chessie maintains that both interlined and differential movements are higher cost traffic, its petition was not accompanied by a cost study demonstrating that it is, in fact, experiencing substantially higher costs for the carriage of coal to Dickerson. Nevertheless, defendant petitions for a full reopening of this proceeding for the receipt of new cost evidence based on current operating conditions.

This petition, which is addressed to our discretion,[21] must be viewed in the context of the procedural history of this proceeding:

1. By complaint filed December 23, 1974, the Potomac Electric Power Company (PEPCO) contended that the existing trainload and unit-train rates to its Chalk Point (Herbert, MD), Morgantown (Woodzell, MD), and Dickerson (Dickerson, MD) electric generating stations violated section 1(5) of the act.

2. By initial decision dated May 20, 1976, and served May 27, 1976, an Administrative Law Judge found that PEPCO had not sustained its burden of proving the existing rates unlawful in any respect.

3. On review, the Commission's Division 2, in its report and order of April 1, 1977, served April 12, 1977, affirmed the Administrative Law Judge's findings except that it found the trainload rate on coal movements to PEPCO's Dickerson plant to be unjust and unreasonable in violation of section 1(5) of the act. It reopened the proceeding for the limited purpose of receiving further evidence of trainload rates to Dickerson.

4. In its report and order of further hearing, dated October 21, 1977, and served October 28, 1977, division 2 prescribed the maximum reasonable rates on trainload shipments of bituminous coal to Dickerson, MD.

5. By order of December 2, served December 5, 1977, the Commission declined to extend the effective date of its October 21, 1977, order pending judicial review.

See rule 1100.98(e) of our Revised Rules of Practice.

6. In its report and order on reconsideration dated April 7, 1978, served April 17, 1978, the Commission reviewed its report and order of October 21, 1977, and, finding no material error, determined not to reopen this proceeding.

7. The Commission's April 1, 1977 decision in this proceeding has recently been remanded to it by the U.S. Court of Appeals for the District of Columbia.[22] Its October 21, 1977 decision is under review by the U.S. Court of Appeals for the Fourth Circuit.[23]

This proceeding has been before this Commission for almost 4 years, has been the subject of an initial decision by an Administrative Law Judge, two decisions by Division 2, and one decision by the entire Commission. All of these decisions seriously considered the question of the maximum reasonable rate on bituminous coal from the base district to Dickerson, MD. The orders resulting from those decisions are under review by both this Commission and a United States Court of Appeals.

There must be finality to litigation. To grant defendant's petiton would be to invite relitigation of an issue which has been thoroughly explored in an already overlong proceeding. We will not unduly prolong the administrative process. Should Chessie believe that its costs for hauling coal traffic from the base district to Dickerson have significantly changed, it may petition for modification of our October 21, 1977, order to allow a filing of increased rates for that traffic. Such a petition should be accompanied by a cost study and state the proposed increased rates. If special permission is granted to file a schedule containing such a rate, the schedule itself, would, of course, be subject to protest and possible suspension and investigation.

It is ordered, that the petitions of the parties are denied.

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[22] *Potomac Electric Power Company* v. *United States of America*, 584 F. 2d 1058 (decided August 2, 1978) civil action No. 77-1494.

[23] *The Baltimore and Ohio Railroad Company and the Western Maryland Railroad Company* v. *United States* (USCA, 4th Cir.) civil action No. 77-2497

SECTION 5b APPLICATION NO. 7

RAILROADS PER DIEM, MILEAGE, DEMURRAGE AND STORAGE—AGREEMENT

Decided October 4, 1978

Proposed amended ratemaking agreement found not to comply fully with the essential standards of section 5b of the Interstate Commerce Act. Order to be entered terminating interim approval of the agreement unless within 60 days applicants (1) submit a revised agreement in conformity with this decision, and (2) show cause why they should not be required to maintain verbatim transcripts of certain committee and bureau discussions as well as hold open meetings and maintain sound recordings of certain other committee and bureau discussions.

Stephen Ailes, Harry J. Breithaupt, Jr., James I. Collier, Jr., and *Thomas C. Dorsey* for applicants.

John F. Donelan and *Frederic L. Wood* for the National Industrial League, in opposition.

Charles A. Tobin for the Federal Trade Commission, in opposition.

DECISION

BY THE COMMISSION:

In the report in Section 5b Application No. 7, *Railroads Per Diem, Mileage, Demurrage—Agreement,* 353 I.C.C. 673 (1977), the Commission, Division 2, found *inter alia* that approval of the collective ratemaking agreement then proposed by applicants pursuant to section 5b of the Interstate Commerce Act was not prohibited by sections (4) and (5) of that section, and that, in furtherance of the national transportation policy declared in the act, the antitrust relief provided in paragraph (8) of section 5b should apply with respect to the making and carrying out of the agreement subject to certain terms and conditions. Specifically, the Commission found that notice provisions of the proposed agreement were generally inadequate, that there was no opportunity for input from subscribers and other interested persons prior to initial consideration by the General Committee, that 30 days' notice should be provided to permit shippers adequate opportunity to submit their views regarding rates of compensation for shipper-owned equipment for consideration by the Committee on Compensation, and that the proposed agreement was devoid of definite procedures for the processing of proposals, and devoid as well of time limits applicable to committee processing of proposals. Final approval was withheld pending submission of a revised agreement consistent with the conclusions reached in the report.

On July 8, 1977, applicants submitted a revised agreement to comply with the Commission's findings. The amended agreement here considered, like the agreement originally proposed, is applicable nationwide and provides for the joint consideration, establishment, and adjustment of (a) rates payable for the use of foreign line and other nonshipper-furnished freight cars and other transportation equipment, (b) rates payable for use of shipper-furnished equipment, including freight cars, (c) demurrage and storage charges payable by shippers for use of freight cars or other transportation equipment and facilities and (d) rules and regulations pertaining to all such rates, allowances, and charges. Upon review of the revised agreement, we find that the agreement still fails to comply fully with the discussion in the earlier report. In addition, we recommend certain alterations in the agreement to clarify it and render it more internally consistent.

We note that under article V as presently drafted, only subscribers may appeal if the General Committee or Committee on Compensation fails to submit a proposal for subscriber vote. Inasmuch as article III permits interested persons to submit proposals to the Committee on Compensation, we believe that the revised agreement would be rendered more consistent, and be further improved, if interested persons were permitted to appeal the failure of the Committee on Compensation to submit a proposal for subscriber vote.

In addition, the agreement should clarify the relationship between the general provision in article X affording subscribers and interested persons 10 days after notice is given of a proposal received by the General Committee or Committee on Compensation in which to submit comments to the appropriate committee, on the one hand, and, on the other hand, the more restricted provision in article VIII of a period of not less than 30 days after notice by publication in the Traffic Bulletin for submission in writing by owners of shipper-furnished freight cars or other transportation equipment of data and views for consideration by the Committee on Compensation whenever the committee has under consideration a change in rates of compensation for such shipper-furnished equipment. Such clarification could be achieved, for example, by adding the phrase "except as otherwise provided" to the second sentence of article X, or alternatively, article VIII might be rephrased to state that its 30-day comment period is provided either in lieu of, or in addition to, the 10-day comment period provided generally in article X. We suggest in addition that article X be further altered by expanding the time provided generally for comment by subscribers and interested persons to a period of at least 15 days, which would bring this provision into conformity with the parallel provision of article IX, to be discussed below.

Although article IX provides to any "interested subscriber or Section 22 shipper" a period of 15 days after notice by the Committee on Compensation of a "customary" (i.e., nonemergency) proposal in which to file written representations, as presently worded it also contains an apparently inconsistent provision that "no final disposition will be made of a (customary) Section 22 proposal earlier than fourteen (14) days subsequent to the date of such notice, except in the case of an emergency proposal which may be finally disposed of within ten (10) days after notice." The phrasing of these provisions, when juxtaposed, would appear in contravention of all notions of due process to permit the committee to vote or take other action prior to submission of a properly filed written representation by a subscriber or interested section 22 shipper. The inconsistency should be eliminated by providing that no voting or other action by the committee on a nonemergency proposal shall take place prior to expiration of the mentioned 15-day comment period. In addition, as to expedited action because of an "emergency" as defined in article IX, applicants should provide that notice be given that the proposal will be handled on an expedited basis and provide an opportunity for comment from interested persons prior to carrier action. Moreover, we believe that subscribers as well as interested section 22 shippers should be afforded a meaningful right of appeal from failure or refusal of the Committee to take action on section 22 proposals. Such provision would bring article IX into conformity with the recommended appeal provision of article V.

In all other respects the revised agreement appears to be in substantial compliance with the findings and conclusions of the earlier report in this proceeding. There is, however, another matter which warrants our attention. Subsequent to the issuance of the prior report, the Commission has determined that the recordkeeping requirements of railroad rate bureaus should be modified.

In Section 5b Application No. 8, *Railroads Per Diem and Mileage Rates for Trailers and Containers—Agreement*, decided April 3, 1978, the Commission noted that the purpose of the agreement there considered was to establish solely *among* railroads uniform rates and charges for the use of carrier-owned TOFC equipment—*neither* a joint-line *nor* a single-line proposal within the meaning of section 5b, and that the statutory voting and agreement restrictions on nonparticipating carriers therefore would not apply. The Commission found, nevertheless, that requiring verbatim transcripts would not be unduly burdensome and would be necessary to ensure that the bureau would not act beyond the scope of its antitrust immunity.[1]

More recently, in Section 5b Application No. 2, *Western Railroads—Agreement*, decided July 19, 1978, the entire Commission found, with regard to rate bureau rate committee meetings, that only by opening all portions of such rate committee meetings to the public, and by requiring the keeping of sound recordings of each meeting, could the Commission ensure that rate bureaus were not acting beyond the scope of their respective grants of antitrust immunity under section 5b of the act.

The agreement here is similar to that approved by the Commission in Section 5b Application No. 8, *supra*, in that it relates, in part, to the collective consideration of rates of compensation payable among railroads. The proposed agreement also relates, in part, to the collective consideration of demurrage charges payable by shippers. In this respect, the rate committee meetings directly affect the shipping public.

In light of these decisions, the applicants are directed to show cause why they should not be required (1) to maintain verbatim transcripts of all committee and bureau discussions concerning rates and charges applicable *between or among* subscribing carriers, or concerning pertinent rules and regulations, and (2) to hold open to the public all meetings, or pertinent portions of such meetings, and to maintain sound recordings of all committee and bureau discussions concerning rates of compensation for *shipper*-furnished transportation equipment, as well as pertinent rules and regulations, or concerning demurrage and storage charges payable by shippers for the use of freight cars and other transportation equipment and facilities, as well as pertinent rules and regulations.

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[1] "Unlike other agreements, shippers and other interested parties are not (directly) concerned with collective ratemaking under the proposed agreement and generally do not attend meetings as witnesses or observers. For this reason, the activities of the bureau must be closely monitored by this Commission to ensure that the shipping and consuming public are adequately protected."

FINDINGS

We find that the revised agreement submitted by applicants must be further amended, in conformity with the above discussion, before final approval of the agreement can be given by the Commission.

Moreover, applicants must show cause within 60 days as to why they should not be required: (1) to maintain verbatim transcripts of all committee or bureau discussions concerning rates and charges between or among subscribing carriers, or concerning pertinent rules and regulations and (2) to hold open to the public all meetings, or pertinent portions of such meetings, and to maintain sound recordings of all committee and bureau discussions concerning rates of compensation for shipper-furnished transportation equipment, demurrage or storage charges payable by shippers, and pertinent rules and regulations.

COMMISSIONER STAFFORD, dissenting in part:

Since the time of the Commission action in Section 5b Application No. 2, *Western Railroads—Agreement*, decided July 19, 1978, I have further considered the requirement to open rate committee meetings to the public and to maintain tape recordings of such meetings. Upon subsequent reflection, I am convinced that the costs associated with these requirements, as well as the requirement to keep verbatim transcripts, will outweigh any benefits to be derived. Accordingly, I do not support the show cause order issued by the majority.

It is ordered:

Interim approval of this agreement, granted by order entered October 26, 1976, in Ex Parte No. 297 (Sub-No. 1), will be terminated 60 days from the date of service of this decision unless, within that time, applicants (1) submit a revised agreement in conformity with the conclusions and conditions set forth in this decision, and (2) show cause why applicants should not be required to maintain verbatim transcripts of certain committee and bureau discussions, as specified above, to hold open meetings and maintain sound recordings of certain other committee and bureau discussions, also specified above.

EX PARTE NO. 297 (SUB-NO. 2)

NOTIFICATION OF RATE PROPOSALS FOLLOWING PRIOR INDEPENDENT ACTION

Decided October 4, 1978

On appeal, rules to prevent changes not consented to and cancellations of rates established by independent action under sections 5a and 5b affirmed with clarifications and modifications. Proceeding discontinued.

DECISION

BY THE COMMISSION:

This proceeding is before the Commission on appeal filed by several motor rate bureaus and associations, and railroad rate bureaus and associations.[1] A petition for clarification and modification was also filed by the National Small Shipments Traffic Conference, Inc., and the Drug and Toilet Preparation Traffic Conference.

In its decision of March 7, 1978, the Commission imposed requirements to safeguard the right of independent action for the benefit of carriers, shippers, and other interested parties. To ensure that right, there must be free and open dialogue between these groups, and such dialogue cannot take place without adequate notice of proposed and final rate bureau action, and a full opportunity to be heard on a proposal before final action is taken. The rules defined independent action, and stated what constitutes adequate notice of a proposal to change or cancel a rate established by independent action. They then stated requirements for meeting the duty of adequate notice to shippers and other interested parties, for safeguarding the opportunity of carriers, shippers, and others to be heard concerning proposed changes; and for meeting the duty of adequate notice to, and obtaining consent from motor common carriers.

Brown Transport Corporation; Bulk Carrier Conference, Inc.; Central and Southern Motor Freight Tariff Association, Inc.; Central States Motor Freight Bureau, Inc.; Eastern Central Motor Carriers Association, Inc.; Middle Atlantic Conference; Motor Carriers Traffic Association, Inc.; Neuendorf Transportation Company; Southern Freight Association; Southern Motor Carriers Rate Conference; Southern Ports Freight Committee, and Western Railroads.

On appeal, the petitioners challenged the rules on several grounds. For the reasons discussed below we conclude that the rules previously adopted should be modified. We have also clarified the application of the rules in response to requests from several parties. Requested findings not specifically discussed in this decision have been considered and found not justified. The regulations adopted in the prior decision as amended here are set forth in appendix A.

I. PROCEDURAL MATTERS

A. *Motion to strike Southern Motor Carriers' Rate Conference's petition for reconsideration.*—Outbound Marine Corporation (Outbound) filed a motion to strike parts of the Southern Motor Carriers' Rate Conference's (SMCRC) petition for reconsideration because it did not properly comply with rule 98 of the Rules of Practice. Outboard argued that the petition was longer than provided for in rule 98, that it was filed beyond that rule's deadline, and that Outboard would be prejudiced by its acceptance and consideration. In response, SMCRC argued that rule 97, was the appropriate rule and that it had properly complied with that.

Rule 96 of the Rules of Practice states that where both significant rail matters and nonrail matters are involved in a proceeding, appeals are governed by rule 98. Thus, in our view rule 98 was the proper rule to use for this appeal. Nevertheless, we believe that Outboard would not be prejudiced if the petition is accepted, and that there would be prejudice to SMCRC if it is refused a hearing on the substantive issues on appeal. Outboard's motion to strike SMCRC's petition for reconsideration is denied.

B. *Rule 98 summary missing, Outboard requests rejection of arguments not summarized nor responded to.*—Outboard also stated, in its reply to the petitions, that even if they are accepted under rule 97, several parties[2] failed to provide the three-page preface required by that rule. Outboard requested that arguments not so summarized and not responded to by Outboard be disregarded as not meriting a response.

In our view there is no merit to Outboard's request. All the petitions are brief and a summary does not appear necessary for an understanding of the petitions. To ensure a fair hearing, all arguments will be considered. Outboard's request is, therefore, denied.

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[2] Brown Transport Company; Bulk Carriers Conference; Motor Carriers Traffic Association; and Southern Motor Carriers Rate Conference.

C. *Motion to strike Western Railroad's Administrative appeal.*—Outboard argued that the Administrative Appeal of Western Railroads (Western) should be stricken because it was on appeal of a final decision and did not meet the requirements of rule 98(e), Discretionary Review of Final Decisions. Western argued in response that, though made by the Commission, it was a decision in the first instance, with appeal permissible under rule 98(b) unless precluded by the time constraints of the Railroad Revitalization and Regulatory Reform Act (4R Act).

The Administrative finality of decisions rendered by the entire Commission in the first instance, is an issue to be resolved in Ex Parte No. 55 (Sub-No. 24A), *Rail Appellate Procedures—Revision of Rule 98 of the Rules of Practice*. In view of the fact that other parties had an unquestioned right to file appeals, and in the interest of giving a fair hearing, Western's appeal will be accepted. Outboard's motion to strike the appeal is denied.

D. *Motion by Western Railroads to strike parts of the Department of Justice's reply.*—Western requested that two statements be stricken from the Department of Justice's (DOJ) reply. First, it challenged DOJ's statement that Western chose not to comment on the issue of general rate increases, arguing that the statement is false. Secondly, it challenged DOJ's argument that because comment was permitted in an earlier proceeding it is not required in this proceeding. It claimed that the argument is irrelevant as a matter of law.

Under rule 4(d) of the Rules of Practice, language may be stricken which is redundant, irrelevant, immaterial, impertinent, or scandalous. A misstatement is not sufficient grounds. Nor is the alleged incorrectness of a legal argument. Those are matters relating to the weight to be accorded the statement, not the admissibility of the statement. Western has not stated sufficient grounds for us to grant its motion to strike. The motion is denied.

E. *Motion by CSA to strike part of NSSTC/D&TPTC's reply.*—Central and Southern Motor Freight Tariff Association, Inc. (CSA) requested that two statements be stricken from the reply to petitions for reconsideration which was filed by the National Association of Small Shipments Traffic Conference, Inc., and The Drug and Toilet Preparation Traffic Conference, (NSSTC/D&TPTC). The first statement is that motor carrier bureaus have evolved from publishing agents into pricing offices which instruct carriers concerning their rate levels. The second statement is that carriers allow their independently announced rates to be changed by proposals of the bureau's staff. CSA asserts that these statements are scurrilous and inflamatory with no basis in fact. Truth or falsity is not grounds for striking under rule 4(d) of the Rules of Practice. We do not think the statements scurrilous or inflamatory or otherwise violating the rule. Therefore, the motion is denied.

F. *APA §553—several parties claim the Commission failed to give proper notice in the Federal Register of matters which the proceeding covered, and that, therefore, they were denied an opportunity to be heard on those issues.*—Certain railroad rate bureaus and motor carrier rate bureaus[3] argued that the notice of rulemaking which was published in the Federal Register, July 8, 1977 (see appendix B, *infra*), did not inform potential parties of the ultimate scope of the proceeding. Specifically they claimed that the notice did not alert one to:

(1) The reversal of Ex Parte No. 297,[4] finding 17 (which stated that docketing of general rate increase would not be mandatory); (2) the reversal of Ex Parte No. 297, finding 13 (which stated that public notice of proposals need not identify the proponent); (3) the issue of a minimum 14-day response time ultimately provided for in provision (C) of the order in this proceeding; (4) the issue of notice to and opportunity to be heard of shippers and other interested parties provided for in provisions (B) and (C) of the order; and (5) the application of the rule to railroad rate bureaus. The bureaus claimed that these alleged failures of notice violate section 553(b)(3) of the Administrative Procedure Act (APA), and result in denial of due process (i.e., opportunity to be heard on all the matters in issue in the proceeding). We do not think that the APA has been violated in any of these instances.

The pertinent parts of section 553(b) of the APA state:

> General notice of proposed rulemaking shall be published in the Federal Register ***. The notice shall include—
>
> (3) either the terms of substance or the proposed rule or a description of the subjects and issues involved.

Both statement of the actual substance and simple descriptive notice satisfy the requirements of the APA. The section's main purpose is to assure that participants have an opportunity to express their views on matters which become part of the final rules. The notice must describe the subjects under consideration well enough to allow interested parties to offer "informed criticism and comment"; but, it need not contain every precise proposal the agency may ultimately adopt. ***Ethyl Corp.*** v. ***Environmental Protection Agency***, 541 F. 2d 1 (D.C. Cir. 1976); ***California Citizen's Band Assoc.*** v. ***United States***, 375 F. 2d 43 (9th Cir. 1967).

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[3] Central and Southern Motor Freight Tariff Association; Central States Motor Freight Bureau, Inc., Southern Freight Association; and Western Railroads.

[4] *Rate Bureau Investigation*, 349 I.C.C. 811 (1975).

The APA requirements are satisfied by either a statement of the actual substance of the rules or by a simple descriptive notice. Changes in the proposals may be substantial so long as they are "in character with the original scheme, and were additionally foreshadowed in proposals and comments advanced during the rulemaking." ***South Terminal Corporation*** v. ***Environmental Protection Agency***, 504 F. 2d 646, 657 (1st Cir. 1974).

Where proposals are not precisely described, absence of any comment on them has been held to be evidence that notice was not adequate. ***Rodway*** v. ***United States Department of Agriculture***, 514 F. 2d 809 (D.C.C. 1975); ***Wagner Electric Corporation*** v. ***Volpe***, 446 F. 2d (3d Cir. 1972). Absence of an administrative record or a basis or purpose statement accompanying the promulgated rule is other such evidence. ***Rodway, supra***. In addition, the opportunity to comment must be timely; that is, it must occur before all the crucial decisions have been made. The opportunity to be heard must exist as a part of the decisionmaking process. ***State of Maryland*** v. ***Environmental Protection Agency***, 530 F. 2d 215 (4th Cir. 1975). Since the absence of these things are considered evidence of a lack of adequate notice, their presence must be evidence that there was adequate notice. The fact that an issue was discussed during the proceeding must be evidence that adequate notice was given. Likewise, presence of an administrative record or statement of basis accompanying the rule and concerning the matter is such evidence. As noted below, the indicia of adequate notice were present concerning all of the issues raised on appeal.

(1) Reversal of Ex Parte No. 297, finding 17.—We have decided to reverse our position on this issue. Therefore, no discussion of adequate notice concerning this issue is required.

(2) Reversal of Ex Parte No. 297, finding 13.—Finding 13 of Ex Parte No. 297, 349 I.C.C. 811, stated that public notice of proposals need not identify the proponent. The finding was based on the theory that a carrier proposing a change in rates could be subject to shipper pressure.

Provision A(2)(h) of this rule reverses finding 13. It lists notice of the proponent's identity as one of the requirements of adequate notice. But the reversal is only partial. The notice of identity is only required where the proposed change involves a rate established by independent action.

The notice of rulemaking refers to carriers' lack of knowledge concerning changes in independent action rates. The identity of a proponent of change is necessary to an understanding of the reasons for the proposal and is an important part of the required knowledge and notice. It is, therefore, a subject within the scope of the notice of rulemaking.

In addition, the issue was raised by DOJ in its initial pleading, and by NSSTC/D&TPTC (which requested an even stricter rule allowing only the original independent actor to change the rate). (In that case the proponent would be perfectly indentifiable.) Thus, the requirements of ***Ethyl Corp.***, and ***South Terminal Corp., supra***, are met. The possibility of reserval was raised in proposals and comments advanced during the rulemaking. Enough notice was given that the petitioners on appeal should have known what was at stake. The opportunity to comment existed before the crucial decisions were made, as required by ***State of Maryland***, and a thoroughly justified basis accompanied the rule.

(3) Opportunity to be heard—14 days to respond.—Provision (C) of this rule states that member carriers, shippers, and other interested parties are to have at least 14 days to respond to notice of a change in an independently estabished rate before a bureau's committee meets to consider the proposal. Petitioners on appeal claim that the notice of rulemaking did not give notice that such a provision would be considered.

As stated previously, however, a notice is not required to describe precisely every proposal which becomes part of the final rules. Here, the notice stated an allegation that rate bureaus cancel or change independently established rates of members carriers without their acquiescence or knowledge. Acquiescence can only be proper if a party understands exactly to what it is consenting; and an opportunity to discuss and be heard on issues before they are settled is essential to a fully informed consent.

The self-evident connection between discussion and knowledge makes matters affecting the opportunity to be heard subjects contemplated by the notice of rulemaking. In addition, some parties specifically complained that many reply deadlines were too short to give shippers or carriers sufficient time to analyze proposals and register their views in writing. This claim was stated in their initial statements. According to ***Ethyl Corp.*** and ***South Terminal Corp., supra***, this gave notice that the affect of reply deadlines on the opportunity to be heard was an issue.

(4) Rights extended to shippers and the public by provisions (B) and (C).—Provisions (B) and (C) of these rules provide that shippers and other interested parties, as well as member carriers, shall have adequate notice of proposed changes in independently established rates, and an opportunity to be heard concerning them. Petitioners on appeal claim that the notice of rulemaking gave no notice that the proceeding would consider rights of shippers and the general public.

We think there was sufficient notice. The policy behind protection of independent action has, as a basic goal, the protection of shipper and public interests. Rate bureaus exist to provide a forum for discussion not only between member carriers, but between carriers, shippers, and any other interested parties. It is through such discussion that shippers and the public may protect their interests. Full and complete discussion among these parties cannot take place without adequate notice of a proposal and opportunity to be heard. Since it is through such discussion that shippers and the public may protect their interests (including their interest in the right to independent action), it is clear that any consideration of adequate notice or opportunity to be heard would include shippers and the public as well as carriers. In addition, DOJ discussed the problem of adequate notice to shippers and the public in its initial statement, making it an issue in the proceeding.

(5) Application of provisions (B) and (C) to railroads.—Provisions (B) and (C) of the rules apply to both motor carriers and railroad rate bureaus. Some parties argue that no notice was given that the rules would apply to railroads. There was sufficient notice of their inclusion. The notice itself refers to "rate bureaus." It does not specify that only motor carrier bureaus are involved, nor does it specify exclusion of railroad bureaus. Some railroad bureaus participated in the proceedings, clearly showing that they considered themselves to be affected by the notice of rulemaking. Furthermore, the railroad bureau's inclusion in or exemption from these rules was discussed in statements made by several parties during the proceeding. DOJ specifically brought application of provision (B) into issue by criticizing the railroads' docket notice to the public.

II. REQUESTED CLARIFICATIONS

The Motor Carriers Traffic Association (MCTA) asked whether a change in rate through collective ratemaking procedures of an earlier change through the same procedures of a rate with origins in independent action is within the rule.

MCTA posed a situation in which a rate initially established by independent action has been changed through collective procedures. It asks whether a second change in the rate through collective procedures is covered by the rules. According to provision (F) of the rules it only loses its independent character altogether and completely ceases to be an independent action rate if all carriers have consented to the change. If that is the case here, and the rate has ceased altogether to be an independent action rate, it is no longer within the rules' jurisdiction.

Provision (F) also states that where only some carriers consent and others do not, the rate ceases to be an independent action rate for those who consent, but continues to be one for those who do not consent. If the consenters then attempt a change under collective procedures, the rules would not apply to the change as concerns them, but it would still apply for those who had not consented.

Central States Motor Freight Bureau, Inc. (CSM) requested clarification of provision (A)(1)(c) of the rule, which defines independent action to include action by a carrier member of a bureau to have published for its account a rate established by the independent action of another carrier. The definition is stated to apply regardless of the manner in which the carrier joins the rate. CSM asked whether this definition, therefore, applies to collective action setting the independent action rates as the collective rates for the territory. It asked whether a bureau must comply with the rule's notice and consent procedures for every member-carrier before the collectively established rates may be changed.

The bureau would not have to comply with the rule's notice and consent procedures, as concerns the member carriers involved in the collective action, before allowing a change in the collective rate. The rule is meant to apply where carriers act individually to join in a rate and later attempt to change it for all participants, not where they act collectively to match the rate. Thus, the definition in provision (A)(1)(c) of the rule is clarified to exclude collective action which establishes the independent action rate for all other carriers.

However, any subsequent change in the collective rate will still not apply for the original independent actor or those who joined without use of collective procedures.

MCTA asked whether a proposal joined in by other carriers and processed through collective procedures, but not published for the account of all members, would be an independent action. As explained in answer to CSM's question, the situation described would not constitute an independent action. But the rule's safeguards would still apply for the independent actor and those joining in the independent action rate without use of collective procedures.

MTCA also stipulated that though the rate was processed through collective procedures, it was not published for the account of all carriers. This seems to be a situation similar to that posed by SMCRC, and the same answer would apply. (See below.)

SMCRC asked whether a carrier committee's adoption of a proposal for the account of proponent and carriers desiring to participate comes within the rules SMCRC presented a hypothetical situation in which this might occur: A regular collective proposal is filed but not adopted and the rate committee's action is appealed to a carrier committee. The carrier committee amends the proposal to apply only to the proponent and those carriers desiring to be included. It is approved and processed through collective procedures on that basis.

The hypothetical situation does not involve an independent action and would not come within the rules' jurisdiction. The rate was established because of an attempt at collective ratemaking. It was not originated with the intent to obtain an independent rate, different from the group, and not applying to all members. Thus, it was not an independent action rate in origin or intent. That it coincidentally had a similar effect to that of an independent action rate which was joined by other members does not in itself make it subject to the rules.

Finally, it was asked whether the exception in provision (F) for General Rate Increases (GRIs) exempts them from the requirements of provision (C) as well as provisions (B) and (D). The order itself does not state such an exemption. But, the Commission did indicate in the report accompanying its order (footnote 28 at page 29, page 33, and finding 8) that notice of GRIs was not considered inadequate, and should be exempted from the rules.

Provision (C) deals with the opportunity of carriers, shippers, and the public to be heard on proposals changing or canceling independent action rates *before* a bureau committee, (or other designated body) meets to consider the change or cancellation. While the announcement of a GRI automatically informs all interested parties that independent action rates will be afffected, it does not do so *before* the decision to file is made. Though adequate notice is given, the opportunity to be heard may not be sufficient unless provision (C) applies.

The handling of railroad rate bureau[5] GRIs, however, is already regulated by section 5b(5)(b)(i) of the act, which specifically excepts GRIs from the prohibitions of section 5b(5)(a). Section 5b(5)(b) states:

> (b) The limitations set forth in subdivision (a) shall not be applicable to—
> (i) general rate increases or decreases, if the agreements accord the shipping public, under specified procedures, adequate notice of at least 15 days of such proposals and an opportunity to present comments thereon, in writing or otherwise, prior to the filing with the Commission of the tariffs containing such increases or decreases***.

Section 5b(5)(b)(i) requires at least 15 days for an opportunity to be heard (1 more day than these rules), but that opportunity need only be before filing, not before consideration of the proposal.

The Commission has the power to extend the period for an opportunity to be heard within the context of 5b(5)(b)(i), but to do so would involve a substantial change in railroad procedures for handling GRIs. Since the effect of GRIs on independent action rates cannot be separated from their effects on all other rates, the changes and effects would have a very broad scope.

Such changes should be considered either in a separate proceeding or as a part of the more general revamping of rail agreements which is presently taking place. To deal with it here would be a piecemeal handling of GRIs, one which could delay implemenation of the rules adopted in this proceeding. Therefore, provision (E) of the rules is amended to exclude GRIs from provision (C) as well as provisions (B) and (D). However, we do intend to give further consideration to our finding in Ex Parte No. 297 that docketing of rate bureau proceedings with respect to general rate increases need not be mandatory. In the interim, we urge that all general increases be docketed to assure maximum public notice.

III. Definition of Adequate Notice: Provision A(2)(H), Reversing Finding 13 of Ex Parte No. 297; And the Rights of Shippers and the Public Under Provisions (B) and (C)

Finding 13 of the Ex Parte No. 297 permitted anonymity of proponents of all proposals. Anonymity was permitted in order to prevent coercion or retaliation by shippers which could occur if a proponent's identity were known. The Commission stated that, at that time, there was no need to make identification mandatory.

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[5] As noted in ***Rate Bureau Investigation, supra*** at 837, many motor carrier bureaus already provide for notice and opportunity to be heard consistent with these rules. Thus, the question primarily relates to railroad rate bureaus, whose procedures work differently, and who are guided by section 5b of the act.

We have weighed the possible dangers of identification against the policy of protecting independent action, and found that the latter policy carries greater weight than the former. It is, and has been, our position that any practice which tends to inhibit independent action is unlawful. Without identification of the proponent, the carrier is deprived of full knowledge as to which carrier is changing its independent action rate and why, and so prevented from fully participating in the deliberations. The right to an opportunity to be heard is infringed as well as the right to notice. Both those rights are essential to protection of the right to independent action.

Provision A(2)(h) of the rules (which requires the disclosure of identity) constitutes only a limited reversal of finding 13. We have modified it only as it applies to proposals to change independent action rates. It is left intact as concerns all other proposals.

Carriers stated that they did not ask for protection and do not want it. They claim that disclosure will inhibit independent action because of the fear of retaliation, that present procedures allow them to hide behind rate bureaus when making a change, and that that device is necessary to prevent retaliation. They argue that even if disclosure were necessary, it would only be necessary to provide it to other carriers because independent action is a carrier right, not a shipper right. Therefore, they request that A(2)(h) be eliminated. They also request that provisions (B)(duty of adequate notice) and (C) (opportunity to be heard) not be applied for shippers and the public.

We deny the request. The right to take independent action is a carrier right. But, it does not exist only for a carrier's benefit. The right is a condition imposed for the privilege of making rates collectively with immunity from the antitrust laws. It is imposed as much for the benefit of shippers and ultimate consumers as it is for the carriers themselves. Shippers and the public have no right to take independent action. But, they do have an interest in its preservation, and, therefore, a right to knowledge and an opportunity to be heard concerning changes in it.

Furthermore, the principal purpose of the rate bureaus is to provide a forum for discussion among and between carriers, shippers, and other interested parties. They were not created to allow carriers to hide their actions from the shipping public. In any case, it is unlikely that the carriers could successfully hide behind the bureaus. It is unlikely that shippers would take, at face value, a carrier's statement that it was not responsible because the bureau changed the rate.[6] (The carriers have also argued that the rules will erode their managerial discretion. But, since they do not attempt to explain how, this argument is discounted.)

Disclosure of the identity of a proponent attempting to change or cancel an independent action rate, provision A(2)(h), remains a component of adequate notice. Provisions (B) and (C) remain applicable for shippers and the public.

IV. Defintion of Adequate Notice; A(2)(g).

Provision A(2)(g) of the rules makes the identification of the carriers participating in an independent action a part of adequate notice. The Bulk Carriers Conference (BCC) claims that this requirement is burdensome and should be eliminated. It states that many originally independent action rates are later applied to all carriers. Therefore, a listing of all participating carriers would unduly complicate and enlarge the proposal and would increase the size of the entire docket.

We find, however, that this provision should not be eliminated. It is essential to the enforcement of provisions (D) and (F) of the rules. Without a listing of participating carriers it would be impossible to know whether consent was needed and supplied for changes in independent action rates, and to whom the rates continued or did not continue to apply. This is important knowledge for carriers to have.

In its reply statement in the original proceeding, DOJ proposed that the adequate notice requirement be met by having rate bureaus specify on docket sheets which carriers are participating in the item. It gave an example taken from a CSA docket bullentin.[7] It did not appear bulky or burdensome. Where an independent action rate has been applied to all carriers, some special mark might be used to indicate that all carriers are participating. DOJ's proposal is only one example of a way to comply with the rules. Other devices can be developed to prevent unwieldy dockets.

V. Provision (C); 14 Days to Respond

Provision (C) of the rules requires that interested parties be given 14 days to respond to notice of a proposed change in an independent action rate. Petitioners on appeal criticized this provision on several grounds and requested it be eliminated. First, they claimed that present procedures are effective. We do not agree. While some bureaus' reply deadlines are fairly close to the rules' 14-day requirement, many others have shorter periods—some as short as 7 days. Such short periods do not allow adequate time for analysis, writing, and delivery of written views through the mails before the deadline. (Even where the period is 10 days, there are, at most 6 days for analysis, writing, and mailing.)

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[6] NSSTC/D&TPTC is one shipper which stated in its brief that it would not accept such a statement.

[7] DOJ's reply statement, filed October 27, 1977, at p. 12.

Some petitioners argued that an increase in time to respond would create a greater lag between receipt of the proposal and final publication. But BCC, one of the bureaus making this argument, presently provides 10 working days. Since 10 working days usually includes two weekends, BCC's time requirement is no different than the Commission's and our requirement will cause it no additional problems.

Some parties have argued that the requirement will greatly increase their expenses. But, none has presented an adequately supported estimate of the cost of compliance. Only CSA has presented any figures. CSA presently allows 13 days to reply. It claims that changes in rates can mean more than $100 per day in reduced freight costs or increased freight service, and that a day's extension of reply deadlines will mean a loss of that revenue. CSA fails to show that the sum is significant in relation to total revenue. It also seems to assume that an additional day to respond must delay publication. This is not necessarily so. We do not think that the small possible inconvenience which was shown outweighs the protection against unwanted alterations which this provision affords.

VI. Application of the Rule to Railroad Rate Bureas

The railroad rate bureaus questioned the effects of provisions A(2)(d) and A(2)(f). They interpret A(2)(d) (which makes limitations on weight or other restrictions pertaining to the existing rate and proposed rate part of adequate notice) as requiring applicable limitations and restrictions to be set out in the notice itself, and argue that this would be extremely cumbersome.

The petitioners are mistaken in their interpretation. Section A(2)(d) does not require them to set out details in the notice. A general statement that restrictions or limitations of a particular sort are being considered is sufficient.

Provision A(2)(f) of the rules makes relevant origin and destination points a part of adequate notice. The petitioners stated that some railroad rates are applicable to or from geographical groups, not points; and asked whether each station would have to be identified to comply with this provision. We answer this question in the negative. Where a group adjustment is involved, identification of origin and destination group is sufficient.

Some railroad rate bureaus challenged provisions (B) and (C) of the rules as they apply to them. Most of their attacks on provision (C) concerned its effects on general rate increases. That has been discussed earlier in this report, and GRIs have been excepted from provision (C).

The petitioners also questioned provision (C)'s requirement that carriers, shippers, and others be allowed to express their views by any means of their choosing before a bureau's designated committee or group meets to consider a proposed change in an independent action rate. They claimed that under present railroad bureau procedures, if a party chose to present its views in person, the bureau would have to hold a special meeting for that party in addition to the meeting where the change is proposed and discussed.

This provision's purpose is to ensure that no unreasonable conditions are imposed upon the methods by which parties express their views. But, we do not intend the provision to change established bureau procedures and require that the bureaus' hold an oral meeting on every proposal. Where present procedures provide for submission of views in writing prior to collective consideraton this is sufficient to comply with provision (C). The choices, though broad, are to be within the framework of bureau procedures.

The petitioners also argued that the evidence of their giving inadequate notice to shippers and the public was insufficient. But, the evidenced adequacy or inadequacy of individual past practices was not our only concern in imposing these rules. We intended the rules to define adequate notice and to set down procedures to safeguard that notice. The potential for abuse is a factor to be considered along with actual abuses. DOJ presented examples of both actual abuses and of procedures which leave openings for potential abuse. It was found that the railroad bureaus' procedures did not leave openings for failure of notification to carriers, but did do so where notice to shippers and the public was concerned. The application of provisions (B) and (C) will ensure that the notice is protected.

VII. PROVISION (D); WRITTEN CONSENT REQUIREMENT

Provision (D) of the rules requires written consent from affected motor carriers before any proposed change in their independent action rates may take effect. The petitioners on appeal raised several objections to this requirement.

The first objection was based on a misunderstanding of the rules. Some parties thought that where carriers join in an independent action rate, it cannot be changed unless all those carriers give their consent. That is not the case. Provision (F) of the rules specifically provides that an independent action rate ceases to be one for those carriers which consent to change, but remains one for those who do not consent. Any carrier can consent to a change for its own account. Therefore, if several, but not all, of a group of carriers who had joined in an independent action rate gave consent to a change—the rate would be changed as to them and remain the same for the rest. A negative vote or lack of response from some carrier would not kill the proposal. It would simply limit it.

Petitioners claimed that the rule would be expensive to implement, would make procedures more complex and confusing, and would increase their paperwork. They claimed they would have to increase the size of bureau staffs in order to check each particular independent action routing and that tariffs would become bulky.

DOJ, in its reply statement filed October 27, 1977, suggested a simple low-cost proposal using docket sheets for a check-off system. The docket sheets would specify which carriers are participating in an independent action item. A carrier could give its consent by initiating those it approved and returning them to the bureau. DOJ stated that the major cost of this system would be the minimal expense of postage. Tariff size need not increase greatly since the names of participants can be abbreviated. This is merely an example of one simple, inexpensive way to comply with the rules. Where this method is not feasible (whether because docket sheets are not purchased by all carriers party to the tariffs, or for some other reason), other similar methods may be devised.

Petitioners argued that this provision is ostensibly to protect carriers, but that no carrier raised the issue, that the requirement aids alleged shipper intimidation of carriers, and that it will encourage competitors (at a shipper's instigation) to freeze rates at low levels on items they do not handle.

We have already discussed the connection between shipper and public interests and the independent action rights of carriers. The carriers' rights are for the shippers' and public's benefit as well as their own. Since they are not the only ones with an interest, it is not necessary that the carriers raise the issue. The importance of this right to the interests of all parties outweighs the possible danger of shipper intimidation. Furthermore, no carrier can freeze another's rate.

Two petitioners have proposed modifications of provision (D). Neuendorf Transport Company's amendment would destroy an independent action rate's identity as such when joined by five carriers would allow it to be docketed for general application when requested by the original proponent and would allow waiver of written consent. This amendment strikes at the heart of the rule and would completely nullify provision (D). We do not favor recision of that provision; thus, the proposed modification is rejected.

CSA asked whether it could convert from negative to positive voting in lieu of following the rule's consent requirement. It recites a Commission statement that railroad bureaus do not have to comply with provision (D) because they do not always use the negative vote. But, CSA does not address the major basis of that decision—that railroad rate bureaus operate in a different manner from motor rate bureaus. (Furthermore, what CSA means by negative and positive voting is not clear. If by "negative vote" it means that a proposed change takes effect unless a carrier votes against it, and by "positive vote" it means that the proposal cannot take effect unless the carrier votes for it, then the positive vote procedure it advocates is equivalent to the requirements of the rule, the written consent being proof that a vote was registered.)

VIII. Request by Central and Southern Motor Carriers Association for Tariff Circular Relief

CSA claimed that an increased complexity caused by the rule would make tariff procedures unworkable. It requested that if the Commission affirmed the rule, CSA be granted special permission to depart from rule 4(g) of Tariff Circular MF No. 3 (which requires that a tariff contain all rates on the same commodities) and its companion rule in Tariff Circular MF No. 5. It asked for authority to publish independent action materials in individual carrier tariffs on and after the effective date of the rules.

CSA's examples of unworkable complexity are not persuasive. Its first example hypothesized a commodity rate established by independent action and applying to 20 carriers. A docket is proposed to reduce the rate by 5 percent. Affirmative responses are received from 19 carriers, but the 20th does not respond. CSA argued that the proposal would die for want of consent. This is not true. Under provision (F) of the rules, the change would take effect for the 19 carriers, and would no longer be an independent action rate for them. It would remain one only for the 20th, who did not consent.

CSA's second example is stated unclearly, but seems to be based, again, on its mistaken assumption that consent of all affected carriers is required for change. It merely applies that false factor to a more complex factual situation. Again, we state that those who do approve a change would not be vetoed by those who do not.

Since the relief has been requested before the rules have become effective, the request contemplates hypothetical problems rather than actual problems. Until the rules are in effect and actual problems arise, it will be impossible to gauge the kind and extent of relief which might be needed. CSA's request for tariff circular relief is premature and is, therefore, denied.

IX. RETROACTIVE OR PROSPECTIVE APPLICATION OF THE RULE

Petitioners on appeal request that, if the rules are affirmed, they be applied only prospectively. They state that retroactive application would be extremely burdensome, and in some cases, impossible. Section 5a organizations are only required to keep records for 2 years, so information on existing commodity rates that is over 2 years old is inaccessible. Since most independent actions are joined by a large number of competitors, and many bureaus have not identified the proponents in the tariff, it would be difficult to find out who the original proponent was. The bureaus also claim that they do not have the records to identify all independent action rates.

Against this, DOJ argues only that prospective application will forestall the rules' benefits for years, and that some bureaus can comply retroactively because they publish independent action rates in a separate section of their tariffs, making them identifiable.

We believe that retroactive application would be unfair and unduly burdensome under these circumstances. The benefits of the rules will accrue immediately, since the rules will affect each independent action taken after its effective date.

ULTIMATE FINDINGS

1. The rules are clarified and understood not to apply to those changing rates by use of collective procedures, but only to independent action and those joining without use of collective procedures.

2. The rules' definition of adequate notice is clarified and understood to require railroads to supply a general statement that certain kinds of restrictions are being considered (rather than detailed identification); and to require railroads to identify origin and destination groups (not each station).

3. The rules are modified to exempt general rate increases from the coverage of the provision concerning opportunity to be heard.

COMMISSIONER STAFFORD, concurring in part, dissenting in part:

I reaffirm my opposition to any requirement that the proponent of a rate change be identified. The reasons for retaining anonymity were set forth in Ex Parte No. 297. It is felt, however, that the "policy of protecting independent action" is more important.

While I agree that the latter policy is more important, I am not convinced that the two policies are incompatible. The rationale changing our old policy is weak, and unsupported by any evidence. Until our oversight of rate bureau activities establishes that competitors try to cancel carriers' independent action, there is no basis for nullifying our sound policy assuring anonymity.

It is ordered:

Provision (E) of the rules is amended to read:

> The provisions set forth in paragraphs (b), (c) and (d) above do not apply to proposals to change rates established by independent action where the proposal is made as part of a proposed general rate increase ***.

The report and order served March 10, 1978, in this proceeding is affirmed in all other respects.

APPENDIX A

Under 49 U.S.C. 5b, 5c, 12, 304(a)(6), 49 CFR 1331 is supplemented to read:

§1331.6 Changing or canceling rates established by independent action.

(A) For purposes of this subsection the following definitions shall apply:

(1) "Independent action" is any action taken by a common carrier member of a rate bureau, on or after the date this rule takes effect,

(a) to establish a rate to be published in the the appropriate rate bureau tariff, or to cancel a rate for that carrier's account, or

(b) to instruct the rate bureau that an existing rate (whether established by independent action or collective action), that is proposed to be changed or canceled, be retained for that carrier's account and published in the appropriate bureau tariff, or

(c) to have published for its account in the appropriate rate bureau tariff a rate established by the independent action of another carrier. This definition applies regardless of the manner in which the carrier joins in the rate, as long as the rate published for the joining carrier's account is the same as the rate established by the other carrier under independent action.

(2) "Adequate notice" is notice which informs the carrier, shipper or other interested party for which it is intended (a) that a proposal has been made to change or cancel a rate established by independent action, (b) of the rate proposed to be changed or canceled, (c) the proposed new rate if there is one, (d) limitations on weight or other restrictions pertaining to the existing rate and the proposed rate, (e) the commodities moving under the rate, (f) the relevant origin and destination points, (g) the carriers participating in the rate proposed to be changed or canceled, and (h) the identity of the proponent of the change or cancellation.

(3) A "rate bureau" is a ratemaking conference consisting of common carrier members operating under the provision of an agreement approved by the Commission pursuant to section 5a or 5b of the Interstate Commerce Act, 49 U.S.C. 5b, 5c.

(4) The term "rate" refers to rates, fares, classifications, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto.

(5) A "general rate increase," when the term is used in reference to a motor common carrier rate increase, is a proposed general adjustment of substantially all the rates published in a rate bureau's tariff or tariffs.

(6) A "general rate increase," when the term is used in reference to a railroad rate increase, is a proposed general increase in freight rates or charges for the account of substantially all common carriers by railroad in the United States or in any of the three primary ratemaking territories, namely, eastern, western, or southern.

(7) A "rate restructuring," as the term is used in reference to motor carrier rates, is a proposed general adjustment of rates published in a rate bureau's tariffs with the objective of restructuring the rates on a wide range of traffic, involving both increases and reductions in rates.

(B) Duty of adequate notice to shippers and other interested parties.

Motor carrier and railroad rate bureaus shall provide shippers and other interested parties (not including member carriers of the rate bureau), who have requested notice of proposed rate bureau action under the terms of the rate bureau's agreement, adequate notice of any proposal to change or cancel a rate established by independent action.

(C) Opportunity to be heard.

Before the committee or other group designated under the terms of a motor carrier or railroad rate bureau's agreement meets to consider a proposal to change or cancel a rate established by independent action (whether for the purpose of voting to accept or reject the proposal or to consider whether to recommend it to the rate bureau membership for a final vote), member carriers (in the case of motor carrier rate bureaus), shippers and other interested parties (in the case of motor carrier and rail rate bureaus) shall have no less than 14 days (not counting the day notice of the proposal is sent to these parties) to respond to the notice to express their views to the appropriate committee or group in whatever manner they so choose, be it in writing, in person, or by some other means.

(D) Duty of adequate notice to motor carriers and to obtain their consent.

(1) When a proposal has been made under the collective ratemaking procedures of a motor common carrier rate bureau, or under the right of independent action, to change or cancel a rate established by independent action, all member carriers of the bureau participating in the rate that is proposed to be changed or canceled shall be provided adequate notice of that proposal.

(2) The change or cancellation shall not take effect or, as necessary, be published for the account of any member carrier participating in the rate if the carrier does not communicate to, and the rate bureau does not receive, that carrier's written consent to the change in or cancellation of the rate. Written consent must be freely given without any kind of direct or indirect pressure or coercion from any other carrier, shipper or other party. The requirement that written consent be communicated and received may not be waived by any carrier, shipper, officer of a rate bureau or other party. This rule applies notwithstanding the fact that a carrier of whom consent is required is in actual attendance or voting at a rate committee meeting or other meeting at which the proposal is considered.

(E) General rate increases and rate restructuring.

The provisions set forth in paragraphs (B), (C), and (D) above do not apply to proposals to change rates established by independent action where the proposal is made as part of a proposed general rate increase or rate restructuring, and notice to member carriers, shippers and other interested parties informs the reader in a conspicuous place that the proposal is made as part of a general rate increase or rate restructuring.

(F) A rate established by independent action.

For purposes of this rule a rate established by independent action continues to be a rate established by independent action even after it has been changed pursuant to a general rate increase or rate restructuring of the type defined in paragraph (E). However, a rate established by independent action ceases to be a rate of that character for the account of any carrier participating in the rate that consents in writing pursuant to paragraph (D) to the proposed change in or cancellation of the rate. For example, where more than one carrier is participating in the rate, and the rate is proposed to be changed, the rate continues to be a rate established by independent action for the account of the carriers which do not consent to the change or cancellation, but ceases to be a rate of that type for the account of the carriers that give their consent pursuant to paragraph (d).

APPENDIX B

[49 CFR Part 1331]

[EX PARTE NO. 297 (SUB-NO. 2)]

NOTIFICATION OF RATE PROPOSALS FOLLOWING PRIOR INDEPENDENT ACTION

Petition for Rulemaking

AGENCY: Interstate Commerce Commission.

ACTION: Proposed rule.

SUMMARY: On petition by the U.S. Department of Justice the Commission is considering whether to prescribe a rule prohibiting rate bureaus from publishing changes or modifications to independently established rates and related matters of member carriers without the specific consent of such carriers. This rule will have the effect of eliminating the practice of changing or modifying independently established rates without the specific consent of carriers.

DATES: Statements of intent to participate in support or opposition are due on or before July 28, 1977.

ADDRESS: Send statements of intent to participate to: Office of Proceedings, Room 5342, Interstate Commerce Commission, Washington, D.C. 20423.

FOR FURTHER INFORMATION:
Deputy Director Rosenak or Assistant
Deputy Director Gobetz, Section of Rates, Office of Proceedings, Interstate Commerce Commission, Washington, D.C. 20423, 202-275-7693.

SUPPLEMENTARY INFORMATION:
The United States Department of Justice has petitioned the Interstate Commerce Commission to prescribe a proposed rule reading as follows:

> No rate bureau may publish any tariff which has the effect of changing or modifying any rate, term, or condition of an existing tariff, which rate, term or condition was a result of the exercise of independent action by a member of the rate bureau, unless the rate bureau shall have first notified such member that a proposed tariff will change or modify the rate, term or condition which resulted from that member's exercise of

independent action and shall have obtained the member's written consent to the change or modification.

Petitioner alleges that rate bureaus often cancel or change independently established rates of member carriers without the acquiscience or knowledge of such carriers. It will submit evidence illustrating this practice if the petition is granted and a proceeding instituted. This practice, petitioner argues, hinders a carrier's right of independent action recognized in section 5a(6) of the Interstate Commerce Act (49 U.S.C. §5b) and in Ex Parte 297, Rate Bureau Investigation, 351 I.C.C. 437 (1976). It maintains that the proposed rule is intended to curb the practice.

The matter submitted by petitioner has been variously raised in certain section 5a amendatory agreement application proceedings presently pending before the Commission. Consideration and disposition of the matter in a single proceeding upon a full and complete record will avoid piecemeal litigation and avoid the expenditure of unnecessary time and expense to all parties concerned and the Commission.

NOTE.—This is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

By the Commission. (Commissioners Hardin and Christian were absent and did not participate.)

No. 36437

DEPARTMENT OF DEFENSE—PETITION FOR DECLARATORY ORDER—RE: ESTABLISHING EFFECTIVE DATE OF 3% INCREASE

Decided October 5, 1977

Collection of 3-percent increased charges on household goods prior to the effective date of a valid tariff found to constitute overcharges in violation of section 217 of the act. Proceeding discontinued.

Patrick McEligot and *Bryce Rea, Jr.*, for interested carriers.

Elton L. Brown, John M. Cleary, Dellon E. Coker, John F. Donelan, Peter Q. Nyce, Allen J. O'Brien, P. W. Pollock, M. B. Smith, and *Frank M. Wilcox* for shippers and those representing their interests.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS MURPHY, MACFARLAND, AND CLAPP

BY THE DIVISION:

By petition pursuant to the Administrative Procedure Act, 5 U.S.C. 554(e), filed September 7, 1976, the Secretary of the Army (petitioner) seeks a declaratory order to resolve an alleged uncertainty as to the effective date of the 3-percent general increases in household goods stemming from Investigation and Suspension Docket No. 29035, *General Increase-Household Goods Carriers' Bureau, Agent* (I. & S. M-29035).

A reply was filed October 1, 1976, by Household Goods Carriers' Bureau, Inc. (bureau), acknowledging the existence of a controversy and joining in the petitioner's request (although for opposite reasons).

A notice of this request was served by the Commission November 2, 1976 and published in the Federal Register on November 5, 1976 (41 FR 48831) inviting comments upon the issues raised by the petition, including:

(1) the propriety of the schedules filed by Household Goods Carriers' Bureau, Agent, on behalf of respondent carriers and in response to the Commission's order of May 12, 1976 insofar as those schedules purport to (a) implement a 3 percent increase in rates and charges published therein, (b) supersede or cancel previously published provisions with an effective date of May 15, 1976, or earlier, or (c) authorize the application of a publication labeled "Conversion Chart of Increased Transportation Rates" in lieu of previously published supplements made the subject of the May 12 order in I. & S. Docket No. M-29035;

(2) the effect of the Commission's order of June 25, 1976, in I. & S. Docket No. M-29035, the subsequent special permission application filed by Household Goods Carriers' Bureau, Agent, and Special Permission No. 72-59-M;

(3) the applicable rates or the applicability of the increase for shipments originating between May 15, 1976, and July 12, 1976, (or July 25, 1976, as the case may be) and the possibility that the assessment of the 3 percent increase constitutes an overcharge within the meaning of Section 204a(6) of the Interstate Commerce Act (Act), violates Section 217 or other provision of the Act;

(4) the lawfulness of the higher (increased) rates and the Commission's jurisdiction to determine the lawfulness or unlawfulness of those higher rates, should the conclusion be warranted that the increases sought to be applied were not established in the mannger directed by the Act and or Tariff Circular MF-No. 3 (49 CFR 1307.0 *et seq.*);

(5) any other matters pertinent in establishing the lawful effective dates for the 3 percent increase.

To this notice was appended an announcement of the issuance of an informal opinion of the Commission's Bureau of Traffic, Section of Rates and Informal Cases, regarding the effective date of these increases.

Comments were received on time from the petitioner, the bureau, Aerospace Industries Association of America, Inc. (Aerospace), The National Industrial Traffic League (NIT League), Reynolds Metals Company (Reynolds), American Home Products Corporation (AHP), Minnesota Mining and Manufacturing Company (3M) and the Fibreboard Corporation. These comments are summarized in appendix 1.

THE FACTS

The facts in this proceeding consist of the history of I. & S. M-29035, which is not controverted.

In I. & S. M-29035, *supra,* a general increase of 5 percent was proposed by the Household Goods Carriers' Bureau, Agent, with an effective date of May 15, 1976. On May 14, the Commission's Suspension and Fourth Section Board suspended the pertinent schedules[1] with the phrase "All matter therein insofar as it would increase present rates and charges by more than three (3) percent." The operative part of the suspended schedules is a "Conversion Chart of Increased Transportation Rates" applying a cumulative factor of 110.25 percent of the rate published in the initial issue of the tariff, consisting of the last effective factor of 105.0 percent increased by 5 percent. Upon suspension, the bureau issued May 20, 1976, the suspension notices, a typical example of which is reproduced as appendix 2. This was appropriately filed with the Commission. The bureau also issued a document, reproduced in part as appendix 3, entitled "Applicable Conversion Chart of Increased Transportation Rates to Apply in Lieu of Supplement No. 14 to Tariff No. 165-A Which Has Been Suspended in Part by the Interstate Commerce Commission." An "important notice" was added to the effect that "supplement No. 14 to Tariff No. 165-A should not be discarded as it is effective in part and the legal basis for application of the additional 3 percent increase as provided in this informational conversion chart." This "Conversion Chart" is "Effective: May 15, 1976," and its only significant different from Supplement No. 14 is that it computes a 3-percent (instead of 5) increase over existing rates, 108.15-percent cumulative (instead of 110.35) increase. This document was not filed with the Commission and is unquestionably without force as a tariff for failure to comply with section 217 of the Interstate Commerce Act and the Commission's regulations, 49 CFR Part 1307, and for which no special permission was granted.

By order of June 25, 1976, Division 2, Acting as an Appellate Division, denying reconsideration and vacation of the order of suspension, issued a clarification thereof, by striking the phrases:

> All matter therein insofar as it would increase present rates and charges by more than three (3) percent,

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[1] Household Goods Carriers' Bureau, Agent,

Tariff 162-B, MF-I.C.C. No. 179, supp. 14
Tariff 165-A, MF-I.C.C. No. 182, supp. 14
Tariff 166-C, MF-I.C.C. No. 183, supp. 11
Tariff 167-B, MF-I.C.C. No. 184, supp. 12

These schedules are substantially similar, differing only in the amount of the cumulative factor to be applied to the base rates to obtain the proposed rates. The difference is due to the differing number of past increases. Thus, MF-I.C.C. 179, supp. 14, contains a factor of 115.76 percent, while the other tariffs show a factor of only 110.25 percent. In all cases, the proposed increase amounted to 5 percent.

and inserting in lieu thereof:

> without prejudice to the filing of schedules providing an increase in rates and charges of no more than three (3) percent to be applied in the same manner as the suspended schedules.

The same order required the bureau to cease and desist from imposing the increase *in other than tariff form*. The order was served on June 30, 1976, and by Special Permission Application No. 486, of the same date, filed July 2, 1976, the bureau stated, among other things:

> It is our desire to comply with the order of Division 2 [served June 30, 1976] effective at the earliest possible time and in addition to cancel and withdraw that portion of the increase that is under suspension in I. & S. Docket M-29035.

Special Permission No. 77-59-M was issued on July 7, 1976 authorizing issuance of a conversion supplement, cancellation of the suspended matter in I. & S. Docket No. M-29035, and issuance on 3 days notice. Pursuant thereto, supplements were published effective July 12 and July 25, 1976,[2] illustrated in appendix 4.

DISCUSSION AND CONCLUSIONS

We shall examine the facts in the light of the comments submitted.

The use of the phrase "All matter therein insofar as it would increase present rates and charges by more than three (3) percent" did not reduce the scope of the suspension effected by the order of May 12, 1976. That scope is the schedules noted in footnote 1. The order of suspension clearly provided:

> It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including December 14, 1976, unless otherwise ordered by this Commission.

The order of June 25, 1976, did not modify this provision in its clarification of the phrase quoted above. As the bureau pointed out, a similar phrase was used by division 2 in I. & S. Docket No. M-29026, *Increased Rates, Bulk Commodities, P.I.T.B.*, May, 1976, proceeding discontinued June 1, 1976. In that case, Pacific Inland Tariff Bureau's Tariff 201, MF-I.C.C. 135, supplement No. 20, was suspended, suspension supplement No. 21 was filed, special permission was obtained and supplement No. 22 was published, giving effect to the 3.25-percent portion of the increase unaffected by the suspension order.

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[2] Supplement No. 1 to Tariff MF-I.C.C. No. 189, superseding MF-I.C.C. No. 179. The three other tariffs have the effective date of July 12, 1976.

The suspension supplements (appendix 2) could not accomplish more than give notice of the order of suspension of May 12, 1976. They did not name a single rate, or any proportional increase reducible to dollars and cents. The most obvious confirmation of that conclusion lies in the publication (but not the filing) of the "informational conversion chart" issued by the bureau (appendix 3), which is nothing more or less than a modification of the suspended supplement, using a reduced cumulative factor (108.15 percent instead of 110.25 percent) to produce an increase of 3 percent rather than 5. It is interesting to note that this "informational conversion chart" contains the same information as the supplement filed July 9, 1976, in compliance with the applicable laws and regulations.

The "informational conversion chart" is thus a tariff that fails to conform with the pertinent laws and regulations. In its comments, the bureau attempts to contradict the proclaimed intent of that document ("To apply in lieu of" the suspended schedules). We are not persuaded.

The "cease and desist" provision of the June 25 order is clear. It tells the bureau not to charge a 3-percent increase in other than tariff form. It does not, as contended by the bureau, require any change in the tariffs. This is because there were no lawful tariffs in existence to change.

The bureau's application for special permission, and the subsequent publication of appropriate tariffs provided for the first time, on July 12 and July 25, 1976, the legal justification for the increased charges. Prior thereto, the lawful charges were those computed at rates effective on May 14, 1976.

To answer *seriatim* the questions propounded in the Notice of November 2, 1976, we find:

(1)(a) that the suspension schedules filed by Household Goods Carriers' Bureau, Agent, on behalf of respondent carriers and in response to the Commission's order of May 12, 1976, were ineffective to implement a 3-percent increase in rates and charges; (b) that they do not effectively supersede previously published provisions with an effective date of May 15, 1976 or earlier; and (c) that the application of a publication labeled "Conversion Chart of Increased Transportation Rates" in lieu of previously published supplements made the subject of the May 12 order in I. & S. Docket No. M-29035 was unauthorized and ineffective for any purpose;

(2) That the Commission's order of June 25, 1976, in I. & S. Docket No. M-29035 left unmodified the suspension of the schedules under consideration; that it clarified the order with respect to the 3-percent portion of the proposal not found unreasonable and the manner in which to make it effective; and that the subsequent Special Permission Application, and Special Permission No. 72-59-M made it possible to transform the "informational conversion chart" into a proper tariff publication, which was subsequently done, effective July 12 and July 25, 1976;

(3) That the applicable rates between May 15, 1976, and July 12, 1976, (or July 25, 1976, as the case may be) were those in effect immediately prior to May 15, 1976; and that the assessment of the 3-percent increase during that period constituted an overcharge within the meaning of section 204a(6) of the act, and violated section 217 of the act;

(4) That the increases sought to be applied were not established in the manner directed by the act nor by Tariff Circular MF-No. 3 (49 CFR 1307.0 *et seq.*); reparation therefor is governed by section 204a of the act; and;

(5) That the lawful effective dates for the 3-percent increase are July 12 and July 25, 1976.

The proceeding is discontinued.

APPENDIX I

1. *The Secretary of the Army.*—The issues in this proceeding are confined to the questions surrounding the lawfulness of the bureau's actions subsequent to the May 14, 1976 suspension. Clearly, the bureau's intent in filing the suspension supplement (see appendix 2) was to comply with 49 CFR 1307.34 and the order of suspension; the bureau also intended thereby to implement a 3-percent increase, rather than filing a tariff or supplement. That there was no tariff in effect at that time specifying rates increased by 3 percent is amply illustrated by the transmittal of an informational "conversion chart." Such a conversion chart is simply not a tariff. Perhaps the confusion lies in the language of 49 CFR 1307.34(a)(1), "the *portion* of the publication that is under suspension ***." This cannot refer to a portion of a portion. A more realistic interpretation is that of the order of division 2, served June 30, clarifying the order of suspension. The 3-percent increase only became lawfully

effective July 12, 1976, and any increased charges collected previous to that date were not lawful charges.

2. *The NIT League.*—When the Commission suspends tariffs, they remain suspended until further order. *** Rates and charges can only be collected by carriers in accordance with the specific provisions of lawfully and legally filed tariffs. *** There was no tariff publication on file with the Commission until July 12, 1976 (July 25, 1976, in the case of one tariff) giving effect to a 3-percent increase. The informational conversion charts do not comply with the requirements governing tariff supplements. The Commission's order of June 25, 1976 merely clarified the Commission's earlier suspension order, which was effective in suspending the tariffs as published. The order does not operate to publish or establish tariff provisions. The public is entitled to have published tariffs on file as section 217 requires.

The applicable rates between May 15, 1976, when the 5-percent increase was suspended and July 12 or July 25, 1976, when a 3-percent increase was published cannot differ from the lawfully filed tariffs, which could not and did not reflect any increase.

3. *Aerospace Industries Association of America, Inc.*—It has no desire to capitalize on an inadvertent error or the carriers nor on the omission by the Commission of boilerplate language in its initial suspension order, which language could have prevented the controversy which followed the issuance of that order. Notwithstanding the fact that equity and the intention of the tariff framers may not be accomplished, and even given the fact that a tariff provision may be in violation of a Commission order, nevertheless, shippers and carriers alike are bound by and must adhere to the rates which are stated in tariffs on file with the Commission. Shippers are not charged with notice of provisions in publications other than legally filed tariffs. Shippers were made aware of the suspension of the rates by the filing of the suspension supplement. They were not, however, provided with any tariff provisions which would enable them to separate the valid portions from the proscribed portions of the suspended supplements, nor with lawfully filed and posted schedules which would permit them to construct a rate made up of three factors: the basic mileage rate, all past increases and the 3-percent portion excluded from suspension of the latest schedules. The order of suspension provided:

> That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

The bureau's failure to reissue the suspended schedules so as to provide for an increase of no more than 3 percent, and its decision to assess such an increase without benefit of a properly filed tariff supplement cannot be validated on the basis or the omission of the boilerplate "without prejudice" langugage from the initial suspension order.

4. *Reynolds Metals Company.*—Since the Commission suspended the proposed schedules, the rates therein could not be used. The rates to be applied were those in effect prior to the proposed effective date of the suspended schedules.

The Commission's order of June 25 was not a modification of the order of suspension, but a clarification to emphasize that the effect of the original order was to suspend the schedules complained of in their entirety, without prejudice to the carriers' refiling at the level initially found appropriate. The initial order of suspension, though it may contain confusing phraseology, nevertheless suspended the schedules.

5. ***American Home Products Corporation.***—Adopts the informal opinion of the Bureau of Traffic, Section of Rates and Informal Cases, and the position of the Secretary of the Army. The increase between May 15 and July 12, 1976, constitutes an overcharge within the meaning of section 204a(6) and violates section 217(b) of the act.

6. ***Minnesota Mining and Manufacturing Company.***—Adopt the informal opinion mentioned above. If there were any minor procedural errors in issuing the orders in I. & S. M-29035, the issue of the legality of the rates should not automatically be resolved in the favor of the bureau.

7. ***Fibreboard Corporation.***—The declaratory order should state that the 3-percent increase became effective on July 12, 1976; prior thereto, there was not a proper filing with the Commission, in accordance with tariff circular rules and regulations.

8. ***Household Goods Carriers' Bureau, Inc.***—Referring to an order of division 2, served April 30, 1976, in another proceeding, Investigation and Suspension Docket No. M-29026, ***Increased Rates, Bulk Commodities, P.I.T.B., May, 1976,*** which suspended schedules to the extent they increased existing rates "by more than 3.25 percent," the bureau contends that if the Suspension and Fourth Section Board had followed earlier precedent and suspended the increase in its entirety "without prejudice" it would have been impossible to make the increase effective May 15, 1976, as scheduled. Issue is taken with the informal opinion of the Section of Rates and Informal Cases. The bureau contends that it fulfilled its obligation under 49 CFR 1307.34 by filing the suspension supplements (see appendix 2) and was not required to do anything further to implement the increases. The "Conversion Chart" was not required by the Commission's rules. Contrary to the very wording appearing in the "Conversion Chart" (see appendix 3), the bureau contends the chart "was not intended to serve 'in lieu of previously published supplements made the subject of the May 12 order in I. & S. Docket No. M-29035.'" It is then contended that the June 25 clarifying order of division 2 could have no retroactive effect; that the cease and desist ordering paragraph, notwithstanding its literal language, simply prohibited the bureau "from continuing to impose the three percent increase unless they changed their tariffs." The applicable rates between May 15, 1976, and July 12, 1976, (or July 25, 1976) were the rates "set forth in the tariffs which became effective May 15, 1976, including the unsuspended increase in rates and charges of three percent."

APPENDIX II

Supplements Nos. 11, 13 and 14
Contain All Changes

SUPPLEMENT NO. 14
to
MF-I.C.C. NO. 183

SUSPENSION
SUPPLEMENT

HOUSEHOLD GOODS CARRIERS' BUREAU, AGENT
Participating Carrier
under Power of Attorney MFXA 3 No. 3

ALLIED VAN LINES, INC.
Broadview, Illinois
(Docket No. MC-15735 Sub 5)

SUPPLEMENT NO. 14

to

TARIFF NO. 166-C

NAMING
LOCAL, DISTANCE AND COMMODITY RATES
ALSO EXPORT-IMPORT RATES

ON

HOUSEHOLD GOODS

BETWEEN POINTS WITHIN THE UNITED STATES
(Except will not apply to or from Alaska or Hawaii)

BETWEEN POINTS IN THE UNITED STATES
ON THE ONE HAND, AND, ON THE OTHER,
POINTS IN CANADA AND MEXICO
(Except will not apply to or from Alaska or Hawaii)

BETWEEN POINTS AND PLACES IN HAWAII

SUSPENSION NOTICE

By order of the Interstate Commerce Commission (see Page 2 herein) the effective date of increased rates and charges in
SUPPLEMENT NO. 11, MF-I.C.C. NO. 183,
ALL MATTER THEREIN INSOFAR AS IT WOULD INCREASE PRESENT
RATES AND CHARGES BY MORE THAN THREE (3) PERCENT,
has been suspended to and including DECEMBER 14, 1976, and said provisions may not be used during the period of suspension. Pending restoration or cancellation of the suspended matter, the provisions of Tariff No. 166-C, MF-I.C.C. No. 183, as amended, other than those under suspension, will remain in full force and effect.

ISSUED: MAY 20, 1976

Issued under authority of Rule 10, Tariff Circular MF No. 3, and in compliance with order of the Interstate Commerce Commission in Investigation and Suspension Docket No. M-29035.

ISSUED BY
F. L. WYCHE, Executive Secretary
2425 Wilson Boulevard
Arlington, Virginia 22201

The provisions published herein, if effective, will not result in an effect on the quality of the human environment.

APPENDIX III

FOR INFORMATION PURPOSES ONLY

APPLICABLE

CONVERSION CHART

OF

INCREASED TRANSPORTATION RATES

TO APPLY IN LIEU OF

SUPPLEMENT NO. 14 TO TARIFF NO. 165-A

WHICH HAS BEEN SUSPENDED IN PART

BY THE INTERSTATE COMMERCE COMMISSION

EFFECTIVE: MAY 15, 1976

IMPORTANT NOTICE

SUPPLEMENT NO. 14 TO TARIFF NO. 165-A SHOULD NOT BE DISCARDED AS IT IS EFFECTIVE IN PART AND THE LEGAL BASIS FOR APPLICATION OF THE ADDITIONAL 3% INCREASE AS PROVIDED IN THIS INFORMATION CONVERSION CHART. THE SUSPENDED PORTION OF SUPPLEMENT NO. 14, NAMELY, THE 2% OF THE PROPOSED 5% INCREASE, WILL REMAIN SUSPENDED UNTIL FURTHER NOTICE.

APPENDIX III—Continued

Page 2 SUPPLEMENT NO. 16 TO TARIFF NO. 166-C

FOR INFORMATION PURPOSES ONLY

CONVERSION CHART OF INCREASED TRANSPORTATION RATES TO APPLY IN LIEU OF SECTION XI OF SUPPLEMENT NO. 14 TO TARIFF NO. 165-A, WHICH HAS BEEN SUSPENDED BY THE INTERSTATE COMMERCE COMMISSION ONLY INSOFAR AS IT WOULD INCREASE PRESENT RATES AND CHARGES BY MORE THAN THREE (3) PERCENT.

SECTION XI
CONVERSION CHART OF INCREASED TRANSPORTATION RATES

ALL TRANSPORTATION RATES PUBLISHED IN ITEMS 78, 79 AND 80 AND SECTIONS II, III, IV, V, VI, IX AND X OF TARIFF NO. 165-A, ARE HEREBY INCREASED BY 108.15% AS PROVIDED HEREIN. THIS INCREASE WILL APPLY IN LIEU OF CONVERSION CHART SUPPLEMENT NO. 14 UNTIL FURTHER NOTICE.

NOTE: FOR CONVERSION CHART INCREASING RATES IN SECTION XII, SEE SECTION XIII HEREIN.

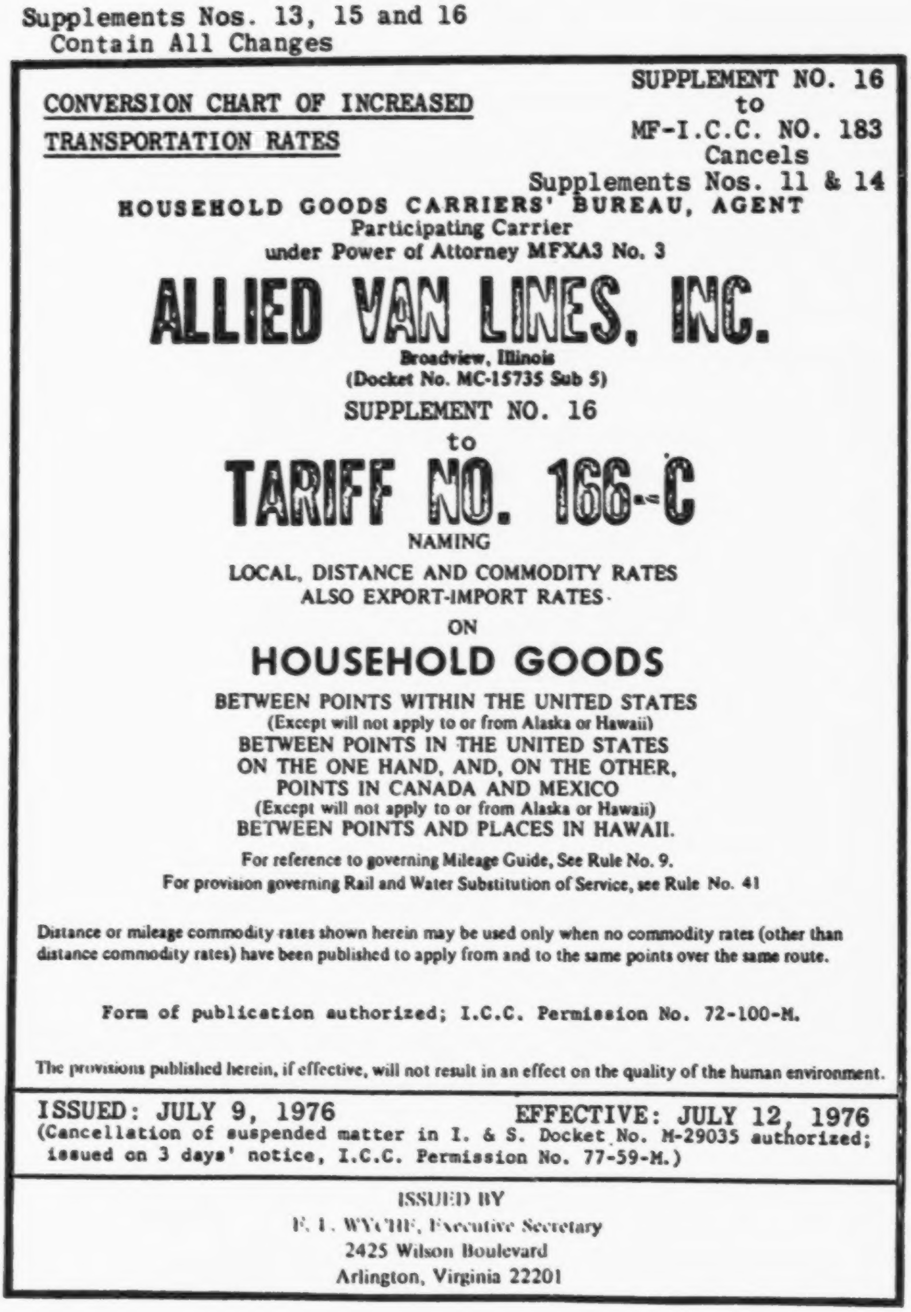
For Conversion Rates not provided for herein, the following formula shall be used for increasing such rates:
Multiply the published rate shown times 108.15% to obtain the increased rate to apply.
Fractions of one-half cent or more will be increased to the next whole cent.
Fractions of less than one-half cent will be dropped.
The break point weight figures for alternate charges of the published transportation rates shown in the sections enumerated above, are no longer applicable. For alternate charge provisions to apply to the increased transportation rates provided herein, see Rule 24 of tariff.

DEFINITION OF COLUMN HEADINGS USED HEREIN:
Column headings reading, "WHERE RATE NOW READS", means the published rate that is to be increased.
Column headings reading, "APPLY NEW RATE OF", means the increased rate to apply in lieu of the published rate.

CONVERSION CHART OF INCREASED TRANSPORTATION RATES

WHERE RATE NOW READS	APPLY NEW RATE OF	WHERE RATE NOW READS	APPLY NEW RATE OF	WHERE RATE NOW READS	APPLY NEW RATE OF	WHERE RATE NOW READS	APPLY NEW RATE OF	WHERE RATE NOW READS	APPLY NEW RATE OF
$1.00	$1.08	$2.75	$2.97	$4.50	$4.87	$6.25	$6.76	$8.00	$8.65
1.05	1.14	2.80	3.03	4.55	4.92	6.30	6.81	8.05	8.71
1.10	1.19	2.85	3.08	4.60	4.97	6.35	6.87	8.10	8.76
1.15	1.24	2.90	3.14	4.65	5.03	6.40	6.92	8.15	8.81
1.20	1.30	2.95	3.19	4.70	5.08	6.45	6.98	8.20	8.87
1.25	1.35	3.00	3.24	4.75	5.14	6.50	7.03	8.25	8.92
1.30	1.41	3.05	3.30	4.80	5.19	6.55	7.08	8.30	8.98
1.35	1.46	3.10	3.35	4.85	5.25	6.60	7.14	8.35	9.03
1.40	1.51	3.15	3.41	4.90	5.30	6.65	7.19	8.40	9.08
1.45	1.57	3.20	3.46	4.95	5.35	6.70	7.25	8.45	9.14
1.50	1.62	3.25	3.51	5.00	5.41	6.75	7.30	8.50	9.19
1.55	1.68	3.30	3.57	5.05	5.46	6.80	7.35	8.55	9.25
1.60	1.73	3.35	3.62	5.10	5.52	6.85	7.41	8.60	9.30
1.65	1.78	3.40	3.68	5.15	5.57	6.90	7.46	8.65	9.35
1.70	1.84	3.45	3.73	5.20	5.62	6.95	7.52	8.70	9.41
1.75	1.89	3.50	3.79	5.25	5.68	7.00	7.57	8.75	9.46
1.80	1.95	3.55	3.84	5.30	5.73	7.05	7.62	8.80	9.52
1.85	2.00	3.60	3.89	5.35	5.79	7.10	7.68	8.85	9.57
1.90	2.05	3.65	3.95	5.40	5.84	7.15	7.73	8.90	9.63
1.95	2.11	3.70	4.00	5.45	5.89	7.20	7.79	8.95	9.68
2.00	2.16	3.75	4.06	5.50	5.95	7.25	7.84	9.00	9.73
2.05	2.22	3.80	4.11	5.55	6.00	7.30	7.89	9.05	9.79
2.10	2.27	3.85	4.16	5.60	6.06	7.35	7.95	9.10	9.84
2.15	2.33	3.90	4.22	5.65	6.11	7.40	8.00	9.15	9.90
2.20	2.38	3.95	4.27	5.70	6.16	7.45	8.06	9.20	9.95
2.25	2.43	4.00	4.33	5.75	6.22	7.50	8.11	9.25	10.00
2.30	2.49	4.05	4.38	5.80	6.27	7.55	8.17	9.30	10.06
2.35	2.54	4.10	4.43	5.85	6.33	7.60	8.22	9.35	10.11
2.40	2.60	4.15	4.49	5.90	6.38	7.65	8.27	9.40	10.17
2.45	2.65	4.20	4.54	5.95	6.43	7.70	8.33	9.45	10.22
2.50	2.70	4.25	4.60	6.00	6.49	7.75	8.38	9.50	10.27
2.55	2.76	4.30	4.65	6.05	6.54	7.80	8.44	9.55	10.33
2.60	2.81	4.35	4.70	6.10	6.60	7.85	8.49	9.60	10.38
2.65	2.87	4.40	4.76	6.15	6.65	7.90	8.54	9.65	10.44
2.70	2.92	4.45	4.81	6.20	6.71	7.95	8.60	9.70	10.49

APPENDIX IV



Supplements Nos. 13, 15 and 16
Contain All Changes

CONVERSION CHART OF INCREASED
TRANSPORTATION RATES

SUPPLEMENT NO. 16
to
MF-I.C.C. NO. 183
Cancels
Supplements Nos. 11 & 14

HOUSEHOLD GOODS CARRIERS' BUREAU, AGENT
Participating Carrier
under Power of Attorney MFXA3 No. 3

ALLIED VAN LINES, INC.
Broadview, Illinois
(Docket No. MC-15735 Sub 5)

SUPPLEMENT NO. 16
to
TARIFF NO. 166-C
NAMING
LOCAL, DISTANCE AND COMMODITY RATES
ALSO EXPORT-IMPORT RATES
ON
HOUSEHOLD GOODS
BETWEEN POINTS WITHIN THE UNITED STATES
(Except will not apply to or from Alaska or Hawaii)
BETWEEN POINTS IN THE UNITED STATES
ON THE ONE HAND, AND, ON THE OTHER,
POINTS IN CANADA AND MEXICO
(Except will not apply to or from Alaska or Hawaii)
BETWEEN POINTS AND PLACES IN HAWAII.

For reference to governing Mileage Guide, See Rule No. 9.
For provision governing Rail and Water Substitution of Service, see Rule No. 41

Distance or mileage commodity rates shown herein may be used only when no commodity rates (other than distance commodity rates) have been published to apply from and to the same points over the same route.

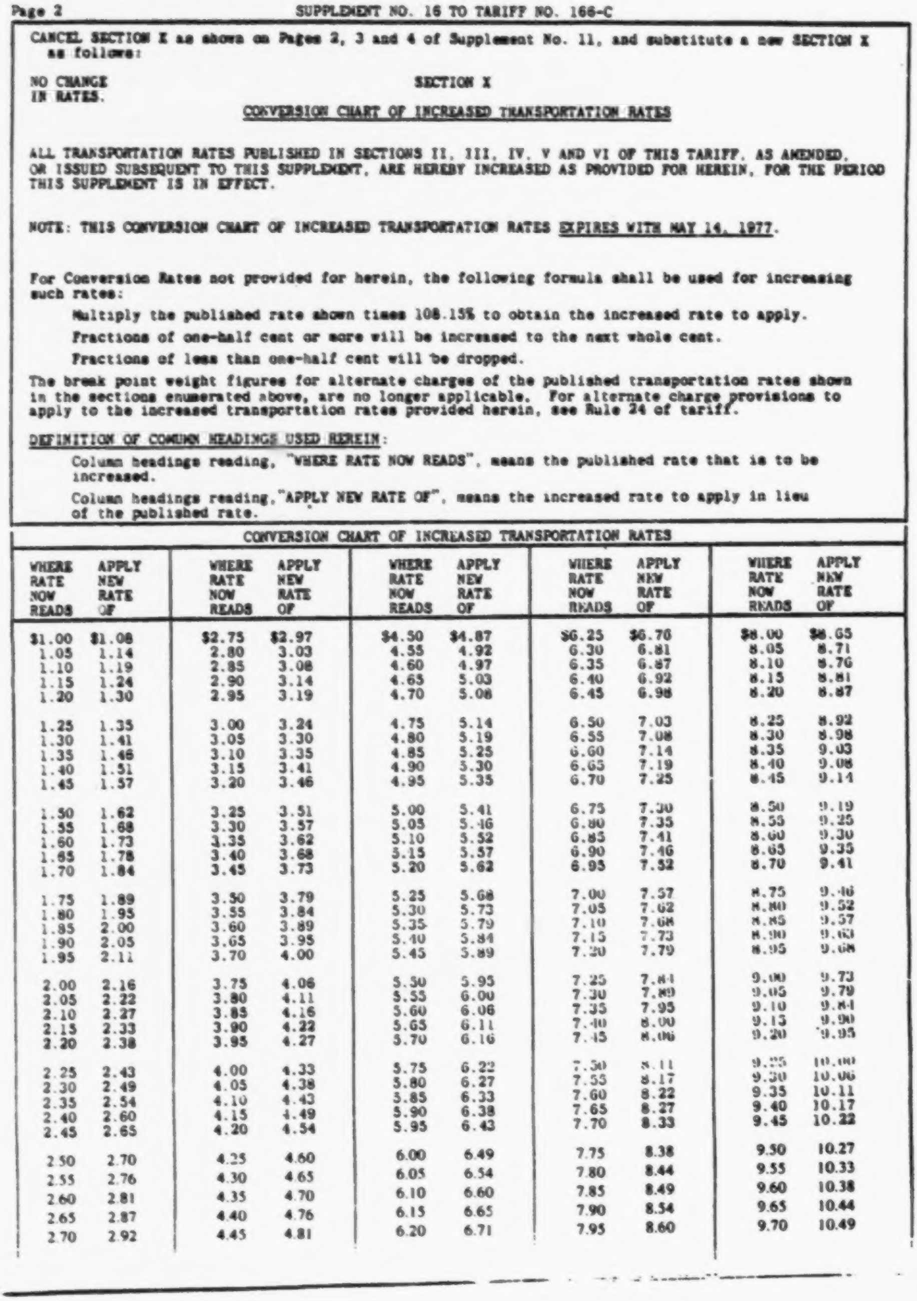
Form of publication authorized; I.C.C. Permission No. 72-100-M.

The provisions published herein, if effective, will not result in an effect on the quality of the human environment.

ISSUED: JULY 9, 1976 EFFECTIVE: JULY 12, 1976
(Cancellation of suspended matter in I. & S. Docket No. M-29035 authorized; issued on 3 days' notice, I.C.C. Permission No. 77-59-M.)

ISSUED BY
F. L. WYCHE, Executive Secretary
2425 Wilson Boulevard
Arlington, Virginia 22201

APPENDIX IV—Continued



Page 2 SUPPLEMENT NO. 16 TO TARIFF NO. 166-C

CANCEL SECTION X as shown on Pages 2, 3 and 4 of Supplement No. 11, and substitute a new SECTION X as follows:

NO CHANGE
IN RATES.

SECTION X

CONVERSION CHART OF INCREASED TRANSPORTATION RATES

ALL TRANSPORTATION RATES PUBLISHED IN SECTIONS II, III, IV, V AND VI OF THIS TARIFF, AS AMENDED, OR ISSUED SUBSEQUENT TO THIS SUPPLEMENT, ARE HEREBY INCREASED AS PROVIDED FOR HEREIN, FOR THE PERIOD THIS SUPPLEMENT IS IN EFFECT.

NOTE: THIS CONVERSION CHART OF INCREASED TRANSPORTATION RATES EXPIRES WITH MAY 14, 1977.

For Conversion Rates not provided for herein, the following formula shall be used for increasing such rates:

Multiply the published rate shown times 108.15% to obtain the increased rate to apply.

Fractions of one-half cent or more will be increased to the next whole cent.

Fractions of less than one-half cent will be dropped.

The break point weight figures for alternate charges of the published transportation rates shown in the sections enumerated above, are no longer applicable. For alternate charge provisions to apply to the increased transportation rates provided herein, see Rule 24 of tariff.

DEFINITION OF COLUMN HEADINGS USED HEREIN:

Column headings reading, "WHERE RATE NOW READS", means the published rate that is to be increased.

Column headings reading,"APPLY NEW RATE OF", means the increased rate to apply in lieu of the published rate.

CONVERSION CHART OF INCREASED TRANSPORTATION RATES

WHERE RATE NOW READS	APPLY NEW RATE OF	WHERE RATE NOW READS	APPLY NEW RATE OF	WHERE RATE NOW READS	APPLY NEW RATE OF	WHERE RATE NOW READS	APPLY NEW RATE OF	WHERE RATE NOW READS	APPLY NEW RATE OF
$1.00	$1.08	$2.75	$2.97	$4.50	$4.87	$6.25	$6.76	$8.00	$8.65
1.05	1.14	2.80	3.03	4.55	4.92	6.30	6.81	8.05	8.71
1.10	1.19	2.85	3.08	4.60	4.97	6.35	6.87	8.10	8.76
1.15	1.24	2.90	3.14	4.65	5.03	6.40	6.92	8.15	8.81
1.20	1.30	2.95	3.19	4.70	5.08	6.45	6.98	8.20	8.87
1.25	1.35	3.00	3.24	4.75	5.14	6.50	7.03	8.25	8.92
1.30	1.41	3.05	3.30	4.80	5.19	6.55	7.08	8.30	8.98
1.35	1.46	3.10	3.35	4.85	5.25	6.60	7.14	8.35	9.03
1.40	1.51	3.15	3.41	4.90	5.30	6.65	7.19	8.40	9.08
1.45	1.57	3.20	3.46	4.95	5.35	6.70	7.25	8.45	9.14
1.50	1.62	3.25	3.51	5.00	5.41	6.75	7.30	8.50	9.19
1.55	1.68	3.30	3.57	5.05	5.46	6.80	7.35	8.55	9.25
1.60	1.73	3.35	3.62	5.10	5.52	6.85	7.41	8.60	9.30
1.65	1.78	3.40	3.68	5.15	5.57	6.90	7.46	8.65	9.35
1.70	1.84	3.45	3.73	5.20	5.62	6.95	7.52	8.70	9.41
1.75	1.89	3.50	3.79	5.25	5.68	7.00	7.57	8.75	9.46
1.80	1.95	3.55	3.84	5.30	5.73	7.05	7.62	8.80	9.52
1.85	2.00	3.60	3.89	5.35	5.79	7.10	7.68	8.85	9.57
1.90	2.05	3.65	3.95	5.40	5.84	7.15	7.73	8.90	9.63
1.95	2.11	3.70	4.00	5.45	5.89	7.20	7.79	8.95	9.68
2.00	2.16	3.75	4.06	5.50	5.95	7.25	7.84	9.00	9.73
2.05	2.22	3.80	4.11	5.55	6.00	7.30	7.89	9.05	9.79
2.10	2.27	3.85	4.16	5.60	6.06	7.35	7.95	9.10	9.84
2.15	2.33	3.90	4.22	5.65	6.11	7.40	8.00	9.15	9.90
2.20	2.38	3.95	4.27	5.70	6.16	7.45	8.06	9.20	9.95
2.25	2.43	4.00	4.33	5.75	6.22	7.50	8.11	9.25	10.00
2.30	2.49	4.05	4.38	5.80	6.27	7.55	8.17	9.30	10.06
2.35	2.54	4.10	4.43	5.85	6.33	7.60	8.22	9.35	10.11
2.40	2.60	4.15	4.49	5.90	6.38	7.65	8.27	9.40	10.17
2.45	2.65	4.20	4.54	5.95	6.43	7.70	8.33	9.45	10.22
2.50	2.70	4.25	4.60	6.00	6.49	7.75	8.38	9.50	10.27
2.55	2.76	4.30	4.65	6.05	6.54	7.80	8.44	9.55	10.33
2.60	2.81	4.35	4.70	6.10	6.60	7.85	8.49	9.60	10.38
2.65	2.87	4.40	4.76	6.15	6.65	7.90	8.54	9.65	10.44
2.70	2.92	4.45	4.81	6.20	6.71	7.95	8.60	9.70	10.49

No. 36566

MAXEY-BOSSHARDT LUMBER CO., INC. v. SOUTHERN RAILWAY COMPANY

Decided October 10, 1978

Upon reopening and further hearing, rates on shipments of transcontinental lumber not shown to violate sections 1(5), 2, or 3(1). Defendant's extension of switching limits and industrial guide publication found to violate sections 1(6) and 2. Defendant ordered to cease and desist from effecting rate changes by any means other than tariff publication.

Nathan L. Finkelstein for complainant.
Charles N. Marshall for defendant.

DECISION

BY THE COMMISSION

By complaint filed April 18, 1977, Maxey-Bosshardt Lumber Company, Inc. (M-B or complainant), a vendor of manufactured forest products, whose principal place of business is near Duluth, GA, alleged that the rates on transcontinental shipments of lumber delivered by the Southern Railway Company (Southern or defendant) unjustly discriminates against and unduly prejudices it, and are unreasonable, in violation of sections 2, 3(1), and 1(5) of the Interstate Commerce Act. Complainant sought an award of damages in the amount of $23,247.08, and a cease and desist order requiring Southern to adjust its rate zones so as to serve complainant at lower rates.

Review Board Number 4 dismissed the complaint by decision of November 2, 1977. That decision became the order of the Commission because a timely administrative appeal was not filed. Upon the petition of M-B, the Commission reopened this proceeding on April 27, 1978, pursuant to section 17(9)(g) of the act. Both parties filed initial statements and replies.

The basis for reopening the proceeding was our concern over defendant's application of "Atlanta zone rates" on traffic moving to Norcross Supply Company, Inc. (Supply), the allegedly preferred receiver of transcontinental lumber. In the prior order of April 27, 1978, we noted the gravamen of complainant's allegations is competitive injury and that, accordingly, our further inquiry would focus upon the protections contained in sections 2 and 3(1) of the act. On reopening, complainant has not further addressed its allegation of a section 1(5) violation. Thus, we conclude that the level of the challenged rates has not been shown to exceed a maximum reasonable level. Additionally, we conclude that the challenged rates and the transcontinental groupings have not been shown on this record to be unjustly discriminatory nor unduly prejudicial. However, we find that defendant's extension of the Doraville switching limits and the attendant industrial guide publication constitute an unjust and unreasonable practice in violation of section 1(6) and unjust discrimination for the advantage of Supply in violation of section 2. The material facts will be briefly restated.

The main line of defendant runs in a northeasterly direction from Atlanta, GA, passing through the towns of Doraville, Norcross, and Duluth, GA, which are local stations on defendant's line. M-B is located at Duluth, east of Norcross. Supply is west of Norcross, between Norcross and Doraville, GA.

The entire country is divided into rate zones for transcontinental traffic on lumber. Traffic to all stations within a particular zone is charged the same rate. Obviously, some demarcation line must be drawn between the zones. In this instance the line falls between the Doraville and Duluth stations. Doraville is the eastermost station in the Atlanta freight rate zone and Norcross is the westernmost station in the "long rate zone." The rate in the long rate zone was 5 cents per hundredweight higher at the Ex Parte No. 336 level than the rate in Atlanta rate zone. All shippers or consignors within the switching limits of the Doraville station served by Southern are placed in the Atlanta zone, and those within the Duluth station switching limits in the long rate zone. Supply is located on the Southern's tracks between Doraville, in the Atlanta rate zone, and Norcross, in the long rate zone. Before October 28, 1971, it was not in the switching limits of either station. Supply was thus not located at a point in the Open and Prepay Station List for which rate groups were accorded in the transcontinental lumber tariff. Rather, it was located in an area between two stations which took different rates. In the situation, rates to Supply were apparently assessed using this destination intermediate rule in the transcontinental lumber tariff. Since Supply was beyond Doraville, the higher long rate zone rates to the next more distant point of Norcross were applicable to Supply.

Prior to October 28, 1971, Supply was charged the long rate. Supply had asked Southern to extend the Altanta zone eastward to include Norcross so that it would have the same rate as its more westerly competitors, but its request was rejected by the transcontinental railroads. However, at the urging of the Georgia Public Service Commission, Southern expanded the switching limits of the Doraville station and amended its industrial guide to show Supply as a point within the Doraville station. Pursuant to this change, Supply's rates are determined on the basis of the Atlanta zone. No change was made in the transcontinental lumber tariffs.

Subsequently, in 1972, M-B moved its office and lumber yard to Duluth. Prior to that time, M-B was located in Atlanta in the lower rate zone. The move placed complainant in the "long rate zone." Because the prior extension of Doraville switching limits was not reflected in any published tariff, M-B avers that it was unaware of Supply's lower level of rates.

Industrial guides are unofficial publications designed to inform shippers of the track location of industries at stations on the lines issuing the guide. Under each competitive station, the guides normally list all industries having rail sidings, the line serving the industry, and whether the industry is open to reciprocal switching. Additional information may also be shown. Industrial guides are periodically changed as new facilities at the station are opened and old facilities are closed. A principal purpose of the guides is to assist shippers in routing shipments. The guides thus serve a useful purpose. However, industrial guides generally are not filed with the Commission and this accounts for their status as unofficial publications.

Section 6 of the act requires common carriers to file with the Commission all rates and charges for transportation between all points they serve. The requirement, of course, extends to any contemplated changes in rates or charges. The schedules are to state plainly all required information and are to be open to public inspection. Any member of the public should be able to determine the rate for a particular item between certain points by reference to the tariff. Any change in rates or charges which is not reflected by tariff publication would be made without notice to the Commission, to competing shippers, or to the public in general. The requirements of section 6 are part and parcel of the regulatory scheme and are fundamental in affording to shippers the protections embodied in sections 2 and 3(1) of the act.

Southern, by changing the switching limits of Doraville and not publishing any change in any tariffs, has extended to Supply an advantage which is not enjoyed by the shipping public in general. We believe this change in switching limits and the corresponding industrial guide publication constitute an unjust and unreasonable practice in violation of section 1(6) and a special device within the proscription of section 2. Industrial guides normally have no affect on rates as the switching limits of a given station are generally fixed. The guides merely reflect changed situations at a station. In our view, this is a proper function of the guides. Here, however, the Southern used its guide as a device to place an existing industry located outside the Doraville switching limits within these limits for the admitted purpose of according it the lower Atlanta zone rates. This was done after a proposal for extension of the Atlanta rate zones had been disapproved under conventional rate bureau procedures and without observing the publication requirements of section 6 of the act. The effect of this action was to place other receivers on the Southern beyond Doraville at a competitive disadvantage as compared to Supply and without appropriate notice.

As a general practice, carriers do not publish changes in switching limits in tariffs. We have no objection to this when the changes are for technical or mechanical improvements in the carrier's service. However, when a change in the switching limits will affect the rates and charges assessed, it clearly must be relfected in the tariff.

In support of its allegations of inequitable treatment by defendant, M-B offers extensive uncontroverted evidence that it must compete with over 25 similar lumber companies in the Atlanta metropolitan area. It argues that the Atlanta "market" consists of five counties. Yet only Gwinett county in which M-B and only a few of the competitors are located, is in the long rate zone. Thus, all competitors in the other four counties are paying a lower rate.

Complainant's failure to bring the transcontinental connecting carriers into this proceeding prevents us from reaching many of the conclusions urged in complainant's argument. Complainant has the ability to determine the scope of this investigation from the outset by naming those carriers believed to have violated the act. M-B has chosen to attribute the allegedly unlawful rates and rate groupings solely to defendant Southern. On the record before us, we are unable to reach that conclusion. In fact, at least insofar as the assailed groupings are involved, defendant's inability to influence the transcontinental carriers in 1971 with regard to Supply suggests that defendant cannot control those groupings.

Section 2 of the act prohibits unjust discrimination in the rates and charges maintained by railroads. The Commission has generally required a complaining shipper to establish that defendant carrier has charged different rates for like and contemporaneous service in the transportation of like kinds of traffic moving under substantially similar transportation conditions. See ***Lindberg & Sons*** v. ***Chicago and N. W. Transp. Co.***, 353 I.C.C. 283, 287 (1977). On the record before us, the transcontinental connecting carriers have not had an opportunity to address the issues of like and contemporaneous service or the similarity of transportation conditions. As will be later discussed, however, we do find the arguments advanced by the Southern to be unpersuasive insofar as it attempts to justify the disparate rates.

The Commission has generally recognized four elements to support a finding of a section 3(1) violation. There must be a showing (1) that a disparity in rates exists, (2) that complainant has suffered competitive injury, either actual or potential, (3) that defendant is the common source of the preferential treatment and the prejudicial treatment, and (4) that the disparity is not justified by transportation conditions. See ***Investigation of Railroad Freight Rate Structure***, 345 I.C.C. 1364, 1417 (1967). In the cited case the Commission also recognized that, should complainant sustain its burden of proof as to the first three of these elements, the burden shifts to defendant or defendants to disprove the fourth element. Again, on the record before us we are unable to conclude that defendant alone is the source of the alleged unlawful rate provisions. The absence of the connecting carriers precludes an appropriate conclusion on the issue of transportation conditions. As previously noted, we do not find the arguments raised by defendant for its part persuasive. Southern denies any violation of the act and urges retention of the present groupings for Atlanta area lumber receivers for several reasons. First, Southern suggests that the groups reflect two distinct clusters of receivers.[1] However, we find this argument unpersuasive as the clusters are very close. The distance between the furthest competitor in the Atlanta rate zone and the closest competitor in the long rate zone is less than a mile. More importantly, all members of both clusters are competing in the same market.

Second, Southern points out that to draw the line between the two zones to include M-B would create a bulge. However, we fail to see how this is material or why any adjustment in groupings would properly be limited only to M-B's facilities. As seen in the map in appendix B, the "line" between the two rate zones is not presently straight. Further, it seemingly divides the Atlanta metropolitan area. Therefore, it would seem highly appropriate to redraw the line so as not to divide the competitors in a single market, particularly since the transcontinental lumber rates are not distance related.

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[1] Actual distances are shown in appendix A.

Southern cites several cases to support its position that it is not required to consider a competitive market when it draws the demaraction line. In *Bognor & Co., Inc.*, v. *Pennsylvania R. Co.*, 305 I.C.C. 21, 24 (1958), the Commission stated that group adjustments are more or less arbitrary and may have the appearance of injustice.

While it is clear that preference and prejudice arising from rate zones may or may not be undue depending on the circumstances, the question must be considered in the light of the entire adjustment and the purpose for which it was established and maintained. Each case must be determined on its own facts and circumstances.

Rate groups are normally designed to stabilize rate relationships between producing points and competing markets. Southern presents no convincing evidence that the line dividing the rate groups should continue as originally drawn in the face of the growth of the Atlanta metropolitan area.

Southern also cites *Silverton Supply Co.* v. *Chesapeake & O. Ry. Co.*, 273 I.C.C. 382 (1948) as showing Commission approval of zones having greater rate differences over even shorter distances than now before us. However, the Commission decided that case on the particular facts, which disclosed other factors offsetting the difference in rates. Southern fails to present evidence here of other factors offsetting higher rates to M-B.

Southern relies on *Wigginton* v. *Chicago & N. W. Ry. Co.*, 227 I.C.C. 41 (1938), 229 I.C.C. 61 (1938) for the proposition that enlargement of the urban area does not necessarily warrant revision of the lines between rate zones. Yet, in that case, the Commission *decreased* the difference in the rates because the existing rate differential created a competitively disadvantageous situation.

This Commission concluded that shippers and receivers of freight are entitled to receive rates on par with the market of which they are a part in *S & K Farms, Inc.*, v. *The Long Island R. Co.*, 357 I.C.C. 562 (1978). The rates M-B are assessed are not on par with the Atlanta rate group. In fact as can be seen from the map in appendix B, M-B's rates would place it in a totally different market.

Additionally, the two rate zones in question cover extensive areas. Where rate zones or groups are small, Southern's defense that M-B is in a cluster outside the Atlanta cluster may be persuasive. However, here there is a small cluster barely outside a large rate zone. While rate zones are by their very nature somewhat arbitrary, here the line dividing the two zones appears unjustified when balancing the carriers' needs against those of the adversely affected shippers.

Southern contends that M-B has suffered no injury, and cites *Hoffstot* v. *Monongahela Ry. Co.*, 248 I.C.C. 248 (1941) for support. M-B, on the other hand, has shown that it is in a major market and that lumber is a high volume, low markup product. As there is generally a small margin of profit in the lumber business, M-B must charge its customers more for lumber than its competitor charges or absorb higher transportation costs out of the small profit.

We also find that complainant has failed to demonstrate injury in the amount of the $23,247.08 in reparations sought. Where competitive injury is alleged, it is well settled that the measure of recovery is not necessarily the difference in charges paid by the complaining shipper. *I.C.C.* v. *U.S. ex rel Campbell et al.*, 289 U.S. 385 (1933). Complainant must demonstrate the amount its business has been damaged because its competitors have paid less for transcontinental transportation services. We believe that the differences in charges paid is not an appropriate showing of damages in this case because prior to the decision to relocate in 1972, complainant knew both that a higher level of rates was applicable to facilities near Duluth and that other Atlanta dealers, aside from Supply, unquestionably enjoyed the lower level of rates. The record does not etablish that Supply either individually or in conjunction with other lumber dealers sets the price for lumber in the Atlanta area. In fact, the verified statements of M-B suggests that on certain occasions, Supply has purchased lumber through M-B. While a certain level of injury may be presumed from the inequities alleged by complainant, we do not believe the record properly reflects a specific measure of damages.

Our conclusions and findings of course are premised on the record before us. They are not a bar to future proceedings or to any appropriate rate adjustments in the future.

It is ordered:

1. Southern shall cease and desist from effecting any changes in transportation rates or charges by any means other than lawfully published tariffs filed with the Commission.

2. The complaint is dismissed and the proceeding discontinued.

By the Commission, Chairman O'Neal, Vice Chairman Christian, Commissioners Brown, Stafford, Gresham, and Clapp. Vice Chairman Christian concurring in the result.

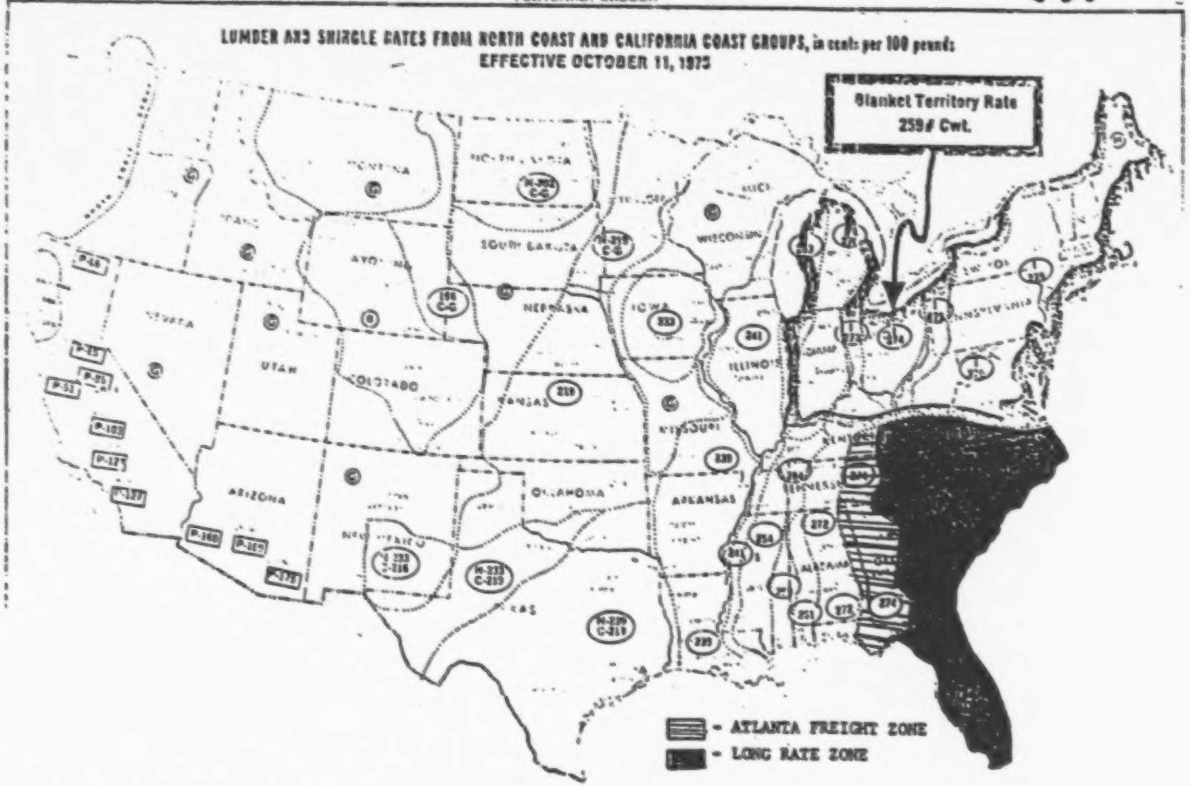
APPENDIX A

Milepost		
623		
622		
621.5	Wickes Lumber	Atlanta Rate Zone
621.3	West Cash and Carry	
621		
620.6	Georgia Pacific	
620	FlintKote	
	Lowe's	
619.3	Norcross Supply	
619	NORCROSS CITY LIMIT	
618.5	Richard's Building Supply	
618		
617		
616		Long Rate Zone
615	Peach Tree Doors	
614.5	Maxey-Bosshardt Lumber Co.	
614.3	Parson's Inc.	
614		
613		

APPENDIX B

WESTERN WOOD PRODUCTS ASSOCIATION

PORTLAND, OREGON



LUMBER AND SHINGLE RATES FROM NORTH COAST AND CALIFORNIA COAST GROUPS, in cents per 100 pounds
EFFECTIVE OCTOBER 11, 1975

Blanket Territory Rate
259¢ Cwt.
MONTANA
NORTH DAKOTA
SOUTH DAKOTA
WISCONSIN
IDAHO
WYOMING
NEBRASKA
IOWA
ILLINOIS
NEVADA
UTAH
COLORADO
KANSAS
MISSOURI
PENNSYLVANIA
ARIZONA
NEW MEXICO
OKLAHOMA
ARKANSAS
TEXAS
P-25
P-51
P-103
P-127
P-160
▨ - ATLANTA FREIGHT ZONE
■ - LONG RATE ZONE

530

No. 36752

HARVEST HOUSE MARKETING CORPORATION v. GREEN BAY AND WESTERN RAILROAD COMPANY

Decided October 18, 1978

Nancy P. Bigbee and *Edward T. Lyons, Jr.* for petitioner.

Thomas L. Schober for Green Bay and Western Railroad Company.

DECISION

BY THE DIVISION:

In a petition for declaratory order filed pursuant to a court referral,[1] Harvest House Marketing Corporation (hereinafter "complainant" or "Harvest House") seeks a determination of the lawfulness of a differential between export and domestic rates on frozen cherries. The rate differential complained of is maintained in tariffs of the defendant Green Bay & Western Railroad Company (hereinafter "Green Bay & Western" or "defendant"), applicable on transportation from Green Bay, WI, to Baltimore, MD. The Green Bay & Western requested that this petition be dismissed (and refused to submit facts or arguments on its merits) on grounds that Harvest House had failed to pay the applicable charges on the export traffic and, therefore, had sustained no loss.

In an initial decision served March 30, 1978, the Administrative Law Judge denied defendant's request to dismiss, but found that complainant had failed to sustain its burden of proving that the differential between the export and domestic rates on frozen cherries constituted a violation of sections 1(5), 2, and 3 of the act.[2]

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[1] By the Brown County Circuit Court, State of Wisconsin.

[2] As pointed out in the initial decision, although the court's order of referral does not specifically refer to a section 2 violation, such a violation was alleged in complainant's opening statement of facts and argument. Moreover, the court's language, which refers to "unreasonable prejudice or disadvantage in comparison with traffic for domestic use," is broad enough to encompass discrimination in violation of section 2.

The matter is before the division on petition for reconsideration filed by Harvest House on May 1, 1978.[3] Harvest House challenges the Administrative Law Judge's findings as to all three sections of the act. Green Bay & Western urges the division to affirm all of the Administrative Law Judge's findings.

Although we accept the Administrative Law Judge's statement of the facts[4] and adopt it as our own, our analysis and conclusion with respect to the alleged section 2 violation differs. We find that Harvest House has in fact established a prima facie case under section 2 and this showing is unrebutted. In view of this finding, it is unnecessary to discuss the other issues raised on appeal. The facts will be reiterated here only to the extent necessary to clarify the section 2 issue.

THE SECTION 2 ISSUE

In February 1976, Harvest House shipped two carloads of frozen cherries from Green Bay, WI, to Baltimore, MD. The cherries were ultimately destined for export to Europe and were tendered to the defendant as the originating carrier.

The defendant's tariff in effect at the time of the transportation set forth two charges for transportation of frozen cherries from Green Bay to Baltimore, depending on whether the commodity was shipped for domestic use or for export from Baltimore. The export rate was approximately twice the domestic rate.[5] However, Harvest House was not advised that such a differential existed when it made inquiry prior to tendering the shipments. Green Bay & Western quoted only the domestic rate. Since Harvest House was unaware that the higher export rate was in fact applicable under Green Bay & Western's tariffs, it decided to ship via the railroad. In addition to the domestic rail rate, Harvest House had also been quoted a motor carrier rate which was higher than the domestic rail rate but lower than the export rail rate.[6]

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[3] Harvest House, in fact, had filed "Exceptions to the Initial Decision" on that date. Those exceptions were not timely (exceptions were due on April 19, 1978) and the initial decision became the order of the Commission on April 19, 1978. However, by letter dated May 5, 1978, Harvest House was advised by the Commission that its pleading would be accepted as a petition for reconsideration.

[4] The facts in this case, for the most part, have been stipulated to by the parties and are set out in the initial decision at sheets 1 and 2.

[5] The domestic rate in effect at the time was 183 cents per hundredweight, minimum weight 60,000 pounds, plus 76 cents per hundredweight excess in proportion (tariff authority: Rate Basis 909 per TL-CTR Tariff 1010, CRC 2032 minimum weight 60,000 pounds; and CRC 2028 excess in proportion per item 9750-C, supplement 73 to TL-CTR Tariff 2010-J). The rate then in effect for frozen cherries moving for export was 365 cents per hundredweight, minimum weight 36,000 pounds (tariff authority: class 37-1 2, item 40050 UFC No. 12, Rate Basis 909 per TL-CTR Tariff 1010).

The transportation of two cars from origin to the point where they were spotted for unloading was performed by the defendant and its connecting carrier under substantially similar circumstances and conditions as if the shipments had been consigned to Baltimore for domestic use rather than for export. There was no additional handling required of the railroads nor additional cost incurred and borne by the railroads in transporting the shipments solely because of the delivery of the commodities at Baltimore for export. The train, switching, and handling services accorded the shipments were substantially the same as if the commodities had been delivered in the Baltimore terminal area for domestic purposes. Stevedoring charges which were incurred in these instances after the shipments were spotted at the pier were separately charged back to and were paid by complainant, and were in no way borne or absorbed by defendant or its connecting carriers.

In addition to the stipulated facts showing that actual carriage of export frozen cherries is the same, Harvest House introduced a verified statement by its president. The witness stated that the rate differential maintained in the rail tariff places Harvest House at a disadvantage compared to its competitors who transport frozen cherries between Green Bay and Baltimore for domestic use.

In rejecting Harvest House's alleged violation of section 2 the Administrative Law Judge observed that export and import traffic have long been held to be different kinds of traffic which need not be transported at the same rates between the same points. Because Harvest House failed to show facts which would permit a finding that the export shipments were like domestic shipments in all respects, and because Harvest House failed to show that it was placed in a position different from any other shipper of export frozen cherries, the Administrative Law Judge found that the evidence was insufficient to determine whether the rates in question apply to "like" kinds of traffic within the meaning of section 2.

In its petition for reconsideration, Harvest House contends that the stipulated facts, showing that the same commodity was transported between the same cities under substantially similar circumstances and conditions, with no charge attributable to the traffic's movement for export, are sufficient to establish that the

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The motor carrier rate was allegedly $2.40 per hundredweight, in comparison with defendant's $1.83 domestic rate and $3.65 export rate.

export traffic is "a like kind of traffic" within the meaning of section 2. Harvest House contends that a showing that it was not placed in a position different from any other frozen cherry export shipper is irrelevant to section 2 which relates to personal discrimination. Harvest House believes that it is placed in a position different from other shippers of frozen cherries between Green Bay and Baltimore merely because it ships that commodity between those cities for export, not because of any difference in the kind or costs of transportation service provided the traffic it ships.

Contrary to the Administrative Law Judge's finding, we believe Harvest House made out at least a prima facie case of a section 2 violation. While we do not take issue with the Administrative Law Judge's observation that export and domestic traffic have long been held to be different kinds of traffic which need not be transported at the same rate, we believe the burden was nevertheless on the carrier to come forward with a justification or explanation for the higher export rate once it had been established that actual carriage of the shipments was the same as it would have been for domestic shipments. The circumstances and conditions justifying the tariff differential at issue in this proceeding, if any, are peculiarly within the knowledge of defendant. However, defendant failed to introduce any evidence whatsoever.[7]

The basic issue here is whether export traffic and traffic destined for domestic use are *inherently* dissimilar kinds of traffic (or move under *inherently* dissimilar circumstances and conditions) within the meaning of section 2.[8] We do not believe that the two kinds of traffic should be so viewed for purposes of establishing a prima facie case of violation of section 2.

Since the Supreme Court's decision in *Texas & Pac. Ry. Co.* v. *Interstate Comm. Comm.*, 162 U.S. 197 (1896), it is clear that import-export traffic need not bear the same rates as traffic destined for domestic use. The Court there struck down an interpretation of section 2 which would have barred the Commission from considering various circumstances and conditions which might distinguish domestic from import-export traffic. As the Administrative Law Judge pointed out, the Court held that the Commission must consider all the circumstances and conditions, including the interests of carriers, producers, dealers, and consumers. The inquiry must go beyond matters relating merely to the actual carriage of the goods, including competitive factors, further transportation of the goods, and other economic conditions. However, the Court's holding did not establish the principle that the two kinds of traffic (i.e. import-export and domestic) are inherently unlike within the meaning of section 2.[9]

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[7] As pointed out by the Administrative Law Judge (initial decision at sheet 3), the defendant's refusal to plead in the proceeding on grounds that Harvest House had failed to pay the published tariff rate is anomalous. On the one hand, defendant brought a court action to collect the published export charges and stipulated to an order of referral to this Commission for a determination of the issues raised by Harvest House in its affirmative defenses to that action. Defendant, through its motion to dismiss and refusal to plead here would now seek to prevent such a determination by the Commission.

[8] That section prohibits charging one shipper more than another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

This interpretation of the requirements of section 2 is borne out in subsequent cases where higher export rates have been challenged under that section. In *Riverside Portland Cement Co.* v. *Director General*, 92 I.C.C. 667 (1924), an export rate on transportation of cement from Crestmore, CA, to San Pedro, CA, of 9.5 cents per hundredweight exceeded the rate for transportation of the same commodity in domestic traffic by 3.5 cents per hundredweight. In its decision finding that the tariff differential violated section 2, the Commission stated:

> The interior movement in each case was over the same rails. The train, switching, and handling services were identical. The record discloses no persuasive reason for this differentiation as between identical transportation movements of the same commodity. [92 I.C.C. at 670.]

In a subsequent case, the Commission ordered a reduction in export rates so that the difference between export and domestic rates on the same commodities between the same cities was no greater than a reasonable charge for additional switching service required in connection with export traffic. There the Commission said:

> Domestic rates are not necessarily proper measures of reasonable export rates on the same commodities, but where, as here, the transportation services in connection with the two classes of traffic are practically identical, except for an additional switching

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[9] But see, *United States* v. *Great Northern Ry. Co.*, 301 I.C.C. 21, 26 (1957) (Chairman Clark and Commissioner Mitchell dissenting), wherein it is stated that the two are not comparable within the meaning of section 2. However, that broad statement appears to be dicta in view of the Commission's finding that competitive circumstances justified lower export-import rates to Hawaii and the Far East than were applicable to Alaskan traffic, which moved under higher domestic rates at issue in that case. Moreover, the case is distinguishable from the instant proceeding in that railroad respondents, in defending the higher domestic rates on the Alaska traffic, introduced evidence showing the history and competitive reasons for the differential, thereby permitting the Commission to make a determination, (in accordance with *Texas & Pacific*) as to whether the circumstances and conditions were sufficient to justify the rate differentials.

> service in connection with the export traffic, the export rate should not exceed the domestic rates, plus a reasonable charge for the switching service. [*Krakauer-Zork Co. v. New York Central R. Co.*, 190 I.C.C. 497, 498 (1932).]

Thus, in those cases most directly analogous to the instant proceeding, the Commission has not hestitated to compare import-export and domestic rates in the context of section 2.

With respect to the Administrative Law Judge's finding that Harvest House failed to show that it was placed in a different position from other shippers of frozen cherries for export (as opposed to cherries destined for domestic use), we do not see that as a fatal defect in making out a prima facie case under section 2. It is sufficient that Harvest House's competitors in the marketing of frozen cherries may ship from Green Bay to Baltimore by rail at one half the rate charged Harvest House. If some circumstances surrounding the subsequent shipment of those frozen cherries to Europe justify the rate differential, then it was incumbent upon the Green Bay & Western to introduce evidence of these circumstances.

Moreover, evidence relating to competitive injury is more germane to an inquiry under section 3(1). Section 2 is directed at discrimination among shippers and prohibits such discrimination even though the shippers may not be competitors. *A. Lindberg & Sons, Inc.* v. *United States*, 408 F. Supp. 1032 (W.D. Mich. 1976).

In the absence of any evidence explaining the differential between the export and domestic rates at issue, we find, and so advise the court, that Harvest House has made a prima facie case of discrimination in violation of section 2. To the extent that the defendant's applicable export rate for frozen cherries between Green Bay, WI, and Baltimore, MD, exceeds the rate for frozen cherries destined for domestic use, it is unjustly discriminatory and, therefore, unlawful.

This decision is not a major Federal action significantly affecting the quality of the human environment nor is it a major regulatory action under the Energy Policy and Conservation Act of 1975.

It is ordered:

This proceeding is discontinued.

No. 36608

INCENTIVE RATE ON COAL—CORDERO, WYOMING TO SMITHERS LAKE, TEXAS

Decided November 28, 1977

Proposed capital incentive rate schedule found qualified for consideration under section 15(19) of the Interstate Commerce Act. Proposed rates found lawful in part.

Jack W. Arlitt, C. Michael Loftus, and *William L. Slover* for protestant.

Curtis H. Berg, Harry L. DeLung, Jr., Richard M. Gleason, Harvey Huston, R. Eden Martin, Milton E. Nelson, Jr., Howard J. Trienens, and *Richard J. Metzgar* for respondents.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

This proceeding is brought under section 15(19) of the Interstate Commerce Act [as revised by section 205 of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210 (the 4R Act)], in accordance with the procedures set forth in regulations (49 CFR 1109.20, *et seq.*) adopted in Ex Parte No. 327, *Rate Incentives for Capital Investment,* 353 I.C.C. 760 (1977). Due and timely execution of our functions under section 15(19) of the act imperatively and unavoidably requires the omission of an initial decision in this proceeding. Requested findings and evidentiary rulings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for the appropriate disposition of the proceeding.

Pursuant to section 15(19) of the act, respondents Burlington Northern, Inc., The Colorado and Southern Railway Company, Fort Worth and Denver Railway Company, and The Atchison, Topeka and Santa Fe Railway Company filed a notice of intent to file schedules setting forth a new capital incentive rate applicable to transportation of coal in unit-train shipments from Cordero, Wyo., to Smithers Lake, Tex., subject to a minimum volume of 4 million tons per year.[1] Respondents' proposed rates are $15.60[2] per net ton (subject to an escalation formula) and $16.54 per net ton (subject to general rate increases rather than the escalation formula) for unit-train movements in shipper-supplied cars. No separate rate is proposed for carrier-owned cars. The proposed transportation would be via Burlington Northern and its subsidiaries Colorado and Southern and Fort Worth and Denver (hereinafter collectively referred to as BN) from Cordero, Wyo., to Fort Worth, Tex., and by Santa Fe from Fort Worth to Smithers Lake, Tex. The total distance is 1,607 miles—1,308 miles via BN and 299 miles over lines of the Santa Fe.[3]

Affidavits accompanying the respondents' notice of intent indicate that respondents anticipate that the following capital investments are required to implement the proposed schedule:

Burlington Northern System share of locomotives and related equipment	$27 million
Improvements and increased maintenance of Burlington Northern track structure	1 million +
Construction of new rail line from Cordero to the Jacobs Ranch Mine of Kerr-McGee Corp. in Campbell County, Wyo.	1 million +
Santa Fe share of locomotives and related equipment	9 million +

Protestant Houston Lighting & Power Company (HL&P) is an electric utility serving the Huston, Tex., area. It has nearly completed, at a total cost of almost $500 million a new coal-fired generating facility at Smithers Lake, Tex. The utility has a long-term coal supply arrangement with the Shell Oil Company for this facility to be provided from Shell's Young's Creek Mine near Decker, Mont. Since this mine is not yet productive, HL&P intends to obtain at least 12,700,000 tons of coal from the Jacob's Ranch Mine of Kerr-McGee Corporation, near the Cordero origin point named in respondents' proposed schedule. Since HL&P is the only receiver of coal in Smithers Lake, Tex. (the only designated destination), it is clear that the proposed schedule is designed to apply to the movement of its coal.

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[1] Respondents also proposed an alternative rate based upon a minimum of 105 cars per shipment in the event the minimum annual tonnage requirement is not met.

[2] The original rate in respondents' proposal filed on June 3, 1977, was $14.18 per net ton subject to escalation on July 1, 1977. Under the escalation formula the proposed rate became $15.60 on July 1, 1977. The evidence of record has been specifically addressed to this latter level.

[3] The proposed schedule is set forth in appendix A.

HL&P filed a protest to the proposed schedule, as set forth in respondents' notice of intent, on July 22, 1977. Pursuant to its obligations under section 15(19) of the act, the Commission instituted an investigation and ordered that the modified procedure set forth in Ex Parte No. 327, *supra,* be followed. The following pleadings were submitted by the parties: an initial presentation of protestant, respondents' reply statement, and protestant's rebuttal statement of fact and argument.

The parties are in substantial disagreement on five major issues: (1) whether the proposed schedules qualify for treatment under section 15(19); (2) whether respondents have market dominance over protestant's coal traffic; (3) the proper method for computing the cost of service and the weight that should be accorded cost evidence in determining maximum reasonableness of rates; (4) the validity of allegedly comparable rates presented by both parties as a basis for determining maximum reasonable rates; and (5) the lawfulness of other conditions of the proposed tariff, including an escalation formula and respondents' failure to offer service in carrier-supplied cars.

POSITIONS OF THE PARTIES

(a) *Do the proposed schedules qualify for treatment under section 15(19) of the act?*—Protestant contends that the proposed schedule should be rejected by the Commission because respondents have failed to establish the threshold requirement for treatment under section 15(19) of the act: that a capital investment of $1 million or more is required to implement the proposed schedule. Protestant concedes that although it has the burden of proof on the lawfulness of the proposed schedule,[4] respondents must be considered to have the initial burden of establishing the validity of the capital investment, and protestant contends that they have not done so. Rather, protestant argues that the anticipated capital investments do not have a sufficient "identifiable effect" upon the HL&P traffic to satisfy the Ex Parte No. 327 requirement of a "nexus between the investment and the implementation of the proposed schedule." 353 I.C.C. 760,765.

With respect to the alleged need for new locomotives which accounts for the vast majority of respondents' anticipated capital investment, protestant alleges that the proponent carriers maintain a large fleet of locomotives to provide the power needed to fulfill their statutory common carrier service obligation. The fact that new locomotives must be purchased from time to time does not mean that the new traffic which happens to be added at these times should be treated as causing these expenditures for purposes of section 15(19). Protestant notes that an exclusive dedication of these locomotives would be a violation of common carrier duties. Testimony, based upon a field study of another unit-train service, is offered to show that the railroads' general practice has been to utilize any individual locomotive or groups of locomotives in whatever service would best satisfy the overall needs of the system, rather than exclusive dedication of locomotives to particular coal unit-train service. Protestant concludes that this is not the type of direct relationship between an investment and a proposed rate which is required by section 15(19) and that if such an investment were accepted for this purpose, rates on virtually every volume movement of any commodity could be filed under the capital incentive rate statute.

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[4] See Ex Parte No. 327, *supra,* 353 I.C.C. at 773.

With respect to improvements and increased maintenance of track which respondents indicate will account for "substantially in excess of $1 million" of the anticipated capital investment, protestant maintains that any expenditures relating to maintenance of roadway are properly considered operating expenses rather than capital investments. Insofar as improvements to track are concerned, protestant offers testimony that the track structure between Cordero and HL&P's new plantsite is fully capable of handling the additional unit-train movements in its present condition, without any improvements. Protestant maintains that respondents' projected improvements will benefit all system traffic and that respondents have failed to establish, on any justifiable basis, the amount of such investment which is attributable to HL&P's coal traffic. Specifically, protestant alleges that respondents' method of allocating portions of the incremental investment to HL&P, based upon coal tonnage projections, is unsupported because workpapers and records which would substantiate the projections have not been entered in evidence.

Protestant concedes that respondents' proposed investment in construction of a new rail line to the Kerr-McGee coal mine in Campbell County, Wyo., comes closest to qualifying as an investment within the purview of section 15(19). However, protestant notes that the line is in fact a portion of a new line which was approved by the Commission in Finance Docket No. 27579, *Burlington Northern, Inc.—Construction and Oper.*, 348 I.C.C. 388 (1976). Since evidence in that proceeding indicates that traffic moving over the new trackage could exceed 100 million tons per year by 1980 and eventually reach a level of 300 million tons annually, protestant argues that the track being constructed to the Jacobs Ranch Mine will be moving a tremendous volume of traffic for a great number of shippers. Since HL&P will ship less than 13 million tons of coal from this origin, it is contended that the proposed capital investment does not have a sufficiently close relationship to the proposed new schedule to warrant treatment under section 15(19).

In reply, respondents state that they are required to purchase 69 locomotives and an additional number of cabooses because of the new HL&P movement, for a total capital investment of over $30 million for BN and over $9 million for Santa Fe. Respondents observe that HL&P specifically acknowledged locomotive purchases in its computation of variable costs (albeit at a figure of 65 rather than 69 locomotives).[5] Respondents contend that there is no requirement that equipment be exclusively dedicated to a particular shipper or service in order to qualify for treatment under section 15(19). They argue that the Commission has recognized that new unit-train coal service requires the purchase of new locomotives in *San Antonio, Tex.* v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976), affirmed *Burlington Northern* v. *United States*, 555 F. 2d 637 (1977), wherein we included the cost of additional locomotives and cabooses, required because of coal traffic to San Antonio, when we calculated the variable cost of providing that service.

Although respondents make no reply to protestant's contention that increased maintenance is properly an expense rather than capital investment, they contend that plant upgrading and expansion attributable to the HL&P movement exceeds $1 million and itself satisfies section 15(19). Respondents argue that the capital investment funds in this category are not for the purpose of restoration (which, according to our interpretation of section 15(19), could not ordinarily serve as the basis for a capital incentive rate),[6] but rather will substantially upgrade and improve the line to handle the new volume coal traffic. While respondents concede that other volume coal movements also contribute to their need to upgrade main-line track (*e.g.*, use of new heavier rail and new communications systems), that fact does not preclude the capital investment attributable to HL&P's traffic from being considered under section 15(19).[7] Respondents again point to the ***San Antonio*** case, ***supra***, where we attributed the cost of plant expansion to the specific coal traffic under consideration there.

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[5] In its reply, protestant claims that it was not conceding that 65 new locomotives would actually be used in its coal service, but only that the railroads' locomotive pool should be credited with 65 locomotives for costing purposes.

[6] See Ex Parte No. 327, *supra*, at 764.

(b) ***Market dominance.***[8]—Protestant maintains that respondents clearly have market dominance over the traffic subject to their proposed schedules. Three presumptions set forth in 49 CFR 1109.1(g)[9] are cited as applicable to the instant movement:

> (1) Where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year * * *,
>
> (2) Where the rate in issue exceeds the variable cost of providing the service by 60 percent or more, and
>
> (3) Where affected shippers or consignees have made a substantial investment in rail-related equipment or facilities which prevents or makes impractical the use of another carrier or mode

With respect to the market share presumption, protestant observes that while there has been no traffic moving between the named origin and destination to date, BN is the only carrier able to provide rail service at the mine from which HL&P's coal will be moving and the Santa Fe is the only carrier serving HL&P's new plantsite. The presumption relating to variable cost of the service is also applicable according to the variable cost calculations submitted by protestant. The substantial investment presumption is made applicable by HL&P's investment in cars to haul the coal and investment in its generating plant at Smithers Lake.

Respondents deny that they have market dominance over HL&P's coal traffic under criteria established by the Commission. Respondents argue that the first presumption of market dominance cited by protestant cannot apply since there has been no traffic at all moving between the named origin and destination. On the basis of cost evidence submitted by respondents, the second presumption relating to the variable cost of service is not applicable either. Respondents concede that HL&P has made a substantial investment in rail-related equipment facilities and has entered into a long-term contract for coal at the point of origin, but contend that the presumption of market dominance created by these investments is irrational and inconsistent with section 1(5)(b) of the act. Moreover, respondents contend that any presumption of market dominance is rebutted by HL&P's careful consideration of competitive coal sources and originating and terminating carriers before deciding on its coal supplier and the location of its plant. Respondents contend that the proposed capital incentive rates (escalated to reflect cost increases) are the same as those offered to HL&P in that competitive environment. Moreover, respondents assert that the fact that Southern Pacific also serves Houston rebuts any presumption of market dominance.

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[7] In respondents' cost calculations, only a portion of these costs are allocated to the HL&P traffic.

[8] Section 202(b) of the 4R Act (section 1(5)(b) of the Interstate Commerce Act) requires a finding of market dominance as a prerequisite to a Commission finding that a rate exceeds a just or reasonable maximum for the service rendered.

[9] In Ex Parte No. 320, *Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization and Regulatory Reform Act of 1976*, final report served October 1, 1977, we promulgated rules for determining market dominance.

In reply, protestant reiterates that the amounts expended by HL&P for trackage and unloading facilities at its Smithers Lake plant, in addition to freight cars which it has already acquired, clearly establish the applicability of the substantial investment presumption of market dominance. The rational of the presumption is that if a shipper has made substantial investment in rail-related equipment which cannot easily be disposed of, it will be committed to rail transportation and defenseless against predatory pricing. Protestant maintains that this case is a perfect example of the type of situation to which this presumption was intended to apply.

Protestant disputes the contention that its prior negotiations for other sources of coal supply indicate a present competitive transportation market. It notes that this issue was fully considered in Ex Parte No. 320, *supra,* when the Commission rejected respondent's broad view of the relevant market and focused on present competitive circumstances.

(c) *Lawfulness of the proposed rate—cost of service, revenue need, and cost of capital.*—Protestant has analyzed the cost to the respondent railroads of hauling HL&P's coal.[10] Protestant made field surveys of the terminal and line-haul facilities over the route and analyzed the operating characteristics of the movement. Using costing techniques approved by the Commission in ***Rules to Govern Assembling & Presenting Cost Evidence,*** 337 I.C.C. 298 (1970), and the Rail Form A[11] formula (with some adjustments) protestant determined the variable cost of providing the service to be $8.61 per

The parties' cost evidence is set out and discussed more fully in appendix B.

I.C.C. Statement No. 1F1-73, "Formula for Use in Determining Rail Freight Service Costs," 358 I.C.C.

net ton or $904.41 per carload. At a variable cost of $8.61 per ton, protestant observes that HL&P's contribution over variable cost would amount to $6.99 per net ton at the proposed rate of $15.60, or almost $35 million per year. Protestant concludes that level of contribution over variable costs is unconscionably high.

As detailed more fully in appendix B, protestant made several assumptions in its calculation of variable costs that have proved particularly controversial. In calculating the operating factors of the HL&P movement, protestant used a figure of 65 locomotives (4 less than respondents' assertion). Secondly, the cost of locomotives and certain fixed plant investment is not allocated directly to HL&P. Instead, system average costs are adjusted (as to locomotive and waycars only) and the cost of serving HL&P then recomputed using the adjusted system averages. Thirdly, and most significantly, protestant's analysis applied cost of capital rates of approximately 5.5 percent for BN and 6.1 percent for Santa Fe. Those rates reflect the embedded cost of debt only, and give no weight to the current higher cost of equity capital.

Respondents' defense of the proposed rates is premised on the new standards for railroad ratemaking set forth in the 4R Act. Respondents cite congressional recognition of the inadequate financial condition of the railroads and state that the principal purpose and effect of the 4R Act is to allow the railroads greater flexibility in setting rates which produce an adequate return and permit the raising of capital. Respondents place particular emphasis on section 205 of the 4R Act which directs that the railroads be permitted to earn "a fair, reasonable, and economic profit or return (or both) on capital employed in the business ***" and that revenue levels should "permit the raising of needed equity capital." Respondents claim that unless these statutory provisions are fully implemented, the railroads will be unable to make the investments in plant and equipment which are necessary to implement the President's National Energy Plan which calls for the ready availability of huge volumes of coal and railroad facilities to haul that coal. Respondents argue that the railroads must raise billion of dollars for new capital investments over the next decade for plant and railroad equipment and a significant portion of that capital is required by the increasing use of coal as an energy source. Respondents state that they will make in excess of $70 million in capital expenditures attributable to the movement of coal to Houston involved in this case.

Respondents offer voluminous testimony on the financial condition of the railroad industry in general and the Santa Fe and BN in particular to show that there is need for additional revenues to attract capital so that adequate and efficient railway transportation service will be available in the future. Proffered testimony indicates that the cost of capital to the railroads is far greater than it was 10 or 20 years ago because of inflation, higher interest rates, and increased demand for capital by the Government and other borrowers. In addition, low profitability and consequent risk to investors has so increased the cost of capital that certain markets are vitually forclosed to the railroads. Numerous recent decisions wherein we have recognized the weak financial position of the industry are cited.

Respondents contend that their roads, during the period 1970-1976, experienced little or no gains in net income, totally inadequate earnings margins, and increasing shortfalls between cash flows from operations and capital expenditures. Evidence introduced by respondents indicates that the BN's ratio of Net Railroad Operating Income (NROI) in 1976 relative to net investment was 2.6 percent and the Santa Fe's 3.5 percent—lower than in any of the 5 preceding years.

Under these circumstances, respondents contend, a cost of capital rate of 5.5-6.1 percent (the embedded cost of debt used by protestant in its cost evidence) would condemn the railroads to a future in which they would be unable to attract needed capital as contemplated by the 4R Act. In support of the claim testimony was presented by respondents on the current cost of capital. Respondents' witnesses determined the cost of capital separately for debt and equity and adjusted the components to produce a weighted cost. Using debt cost in the range of 5.5-8.5[12] percent and equity in the range of 14-16 percent, respondents conclude that their total cost of capital exceeds 11 percent. By contrast, respondents assert that HL&P's use of 5.5-6.1 percent is directly contrary to financial fact and would be confiscatory.

In order to demonstrate what respondents refer to as the obvious inequity of HL&P's position with respect to cost of capital, respondents have introduced into evidence excerpts from the transcript of a hearing held by the city of Houston on an application by HL&P for an increase in its own electric rates. Respondents note that in that hearing it was HL&P's position that needed investment capital cannot be raised without an adequate rate of return which gives effect to current costs of equity capital and argued for a rate which would produce in excess of a 17-percent return on equity investment. Testimony from that hearing by an HL&P witness expressly recognized that the railroads are in a weaker financial condition than electric companies. In light of the position taken by HL&P in the context of its application for a rate increase, respondents assert that it is unconscionable for HL&P—a highly profitable, soundly financial utility with a monoply service market—now to advocate that railroads be allowed only a 5.5-6.1 percent cost of capital in determining the rate for transportation of coal to HL&P's generating station.

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[12] Embedded debt costs and current debt cost, including the current rate on equipment trust certificates, were considered in respondents' evidence.

It is respondents' position that it is inappropriate to base rates solely on costs because individual rates need bear no relationship to costs, either variable or fully allocated. Respondents observe that the Commission has ruled that contributions above variable costs which particular rates should make will vary with demand for, and value of the service provided. Moreover, respondents point out that much railroad traffic must move at rates below fully allocated cost because of competition. Therefore, if a railroad is to earn an overall return which covers its full costs, it must be allowed to set many rates well in excess of their full-cost level where competition, market conditions, and demand permit. For example, respondents point out that because wheat constitutes such a large portion of the Santa Fe's traffic and because rates on wheat are depressed and moving at little over variable cost because of truck competition, coal must contribute relatively more toward systemwide revenue needs.

Notwithstanding respondents' objection in principle to the use of cost evidence in determining rates, they have introduced their own study, in reply to protestant's cost evidence, which sets variable costs at a figure of $12.65—$4.04 higher than protestant's variable cost computation of $8.61. Respondents also submitted fully allocated cost figures of $19.83 based on the ton and ton-mile method and $16.96 based on the ratio method. Respondents contend that the principal error made by HL&P is assuming that capital costs are equal to embedded debt costs. A second alleged error in HL&P's costs relates to its treatment of the additional investment in locomotives and track restructuring which the railroads must make in order to handle this coal traffic. Respondents assert that the costs of such incremental investment such as depreciation and capital cost of new locomotives and other equipment which will be used in the unit-train service—should be borne by the coal shippers rather than simply added to railroads' systemwide costs to produce slightly higher system averages. Respondents stress that they have apportioned only a part of the costs of this incremental investment to HL&P traffic, while the remainder is allocated to other coal traffic. By contrast, respondents assert that HL&P's method could result in shippers of commodities other than coal having to bear part of the costs of new investment required solely in order to serve HL&P and other coal shippers.

Respondents contend that the alleged ratios of the proposed rates to variable and fully allocated costs are plainly reasonable and note that even if protestant's variable cost figure of $8.61 per ton were used, the $15.60 rate is 181 percent of that variable cost. Citing recent Commission decisions including docket No. 36114, *Potomac Electric Power Co.* v. *Penn Central*, 356 I.C.C. 815 (1977), respondents contend that the Commission has upheld coal rates exceeding 200 percent of variable cost. Moreover, 200 percent of protestant's variable cost of $8.61 would produce a rate level of $17.22—a rate which exceeds both of respondents' proposed rates.

In rebuttal, protestant attacks respondents' cost evidence as contrary to accepted costing methodologies and theoretically unsound. Protestant attributes the large disparity between the variable costs of the two parties to respondents' use of an additive which incorporates into variable costs a profit-oriented rate of return on common equity and another additive which establishes the investment in locomotives and roadway through an unwarranted incremental theory of determining the carrier's investment in equipment and roadway property. *Rules to Govern Assembling & Presenting Cost Evidence, supra*; docket No. 35404, *General American Transp. Corp.* v. *Indiana Harbor*, 357 I.C.C. 102 (1977); and Ex Parte No. 290, *Procedures Governing Rail General Increase Proceedings*, decided September 28, 1977, are cited for the proposition that profit may not be considered in computing variable cost. *Rules to Govern Assembling & Presenting Cost Evidence, supra*; *Lumber from Decatur, Ala., to Gulf Ports*, 226 I.C.C. 164, 165 (1938); and *Traffic Bureau of Merchants Exchange* v. *S. P. Co.*, 19 I.C.C. 259, 261 (1910) are cited as being contrary to respondents' incremental investment additive. Moreover, protestant asserts that these additives are theoretically and practically unsound and devoid of legal justification under the 4R Act.

Protestant's position is that costing methodologies advocated by respondents are properly the subject of rulemaking currently being considered by the Commission in Ex Parte No. 338, *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels*, rather than in the context of this individual rate case.

With a disclaimer that it does not believe that it is proper to utilize a rate of return additive in determining variable costs, protestant has introduced its own computation of variable costs using an after-tax rate of return of 8 percent (a rate which protestant deems more reasonable than the 11 percent used by respondents) and an approximation of the effective tax rate rather than a flat statutory tax rate of 48 percent. Protestant's computation on this new basis yields variable costs of $9.13 per net ton. In addition, protestant introduced an analysis of respondents' proposed rates based on the application of the so-called Discounted Cash Flow Methodology to the respondents' claimed incremental investment. The results of that analysis demonstrate, in protestants' view, the extremely high internal rates of return which would accrue to respondents on the incremental investment utilizing either HL&P's variable costs or those of respondents.

(d) *Lawfulness of the proposed rate—comparability.*—Protestant introduced a study of major traffic and operating characteristics of 11 movements which are allegedly comparable to the subject traffic. Protestant indicates that the average rate on these movements is 7.37 mills per ton-mile on an average annual volume of 1,500,000 tons. The rate here proposed by the carriers ($15.60) produces 9.71 mills per ton-mile for movement of 5 million tons per year.

In addition, protestant introduced a second study describing the major traffic characteristics of six coal movements originating at or near Cordero, Wyo., and moving southbound over all or a portion of the rail route to Houston.[13] These movements, allegedly extremely similar to the HL&P traffic,[14] earn average revenues of 7.5 mills per ton-mile. The highest of these rates earns only 7.95 mills per ton-mile. Protestant asserts that on the annual volumes here involved, these disparities amount to $17,746,300 and $14,132,800. Protestant notes that the HL&P traffic is far more desirable from the carriers' viewpoint, on the basis of average data relating to the transportation characteristics of the compared movements.

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[13] See appendix C.

[14] Each movement originates in the Powder River Basin of Wyoming; each travels some portion of the proposed HL&P route; each involves unit train service in shipper owned cars; each involves a high annual volume traveling over a long distance involving a similar size train; and each is subject to comparable loading and unloading time restrictions.

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On the basis of this comparative rate evidence, protestant contends that the proposed rate is so grossly out of line as to be unjust and unreasonable and constitutes an undue and unreasonable prejudice, disadvantage and discrimination in violation of section 3(1) of the act.

In reply, respondents allege that these rates relied upon by HL&P were implemented or negotiated at a time when the railroads were attempting to develop the coal transportation market in the West. Price and demand for coal were relatively low. Competitive factors, including alternative fuels and other modes of transportation were different. As a result, respondents state that the only way coal could move by rail in volume was to quote rates which made only a relatively small contribution to fixed costs and return requirements. Respondents claim that they have sought and are seeking to renegotiate many of these rates which they deem at the low end of the zone of reasonableness.

Respondents state that the need today is less to stimulate new volume coal movements than to raise capital necessary to enable the railroads to handle those movements. They indicate that while the mine-head price of coal has tripled since 1970, the demand for coal and its transportation has increased because of the even more rapid increases in the price of other fuels. Accordingly, respondents suggest five recently implemented rates which allegedly provide a valid basis for comparison.[15]

In addition, respondents argue that any reliance on rate comparisons must be measured against the provisions of the 4R Act, the purpose of which was to effect change by breaking the pattern of past practices, increasing the range of managerial discretion, and enabling the railroads to move to a healthier financial condition. Therefore, respondents argue, even if it were concluded that lower rates made or negotiated prior to the 4R Act are or were comparable to the instant proposal, that fact should not be permitted to frustrate congressional policy with respect to new rates.

In response to protestant's claim that the proposed rates are discriminatory under section 3(1) of the act, respondents cite the *San Antonio* case, *supra*, wherein we found a similar unsubstantiated claim to be without merit.

In response to respondents' allegation that the rates offered by protestant are not truly comparable because they are outdated, protestant offers evidence that all but one of the tariffs on the movements were issued within the last 2 years. Protestant challenges the validity of respondents' rate comparisons on grounds that two of the tariffs contain single-car (rather than unit-train) rates, one is the product of a poor negotiating position of the shipper, another provides excessive free time for unloading not compatible with unit-train service, and the last (the Amsterdam rate) is, in protestant's view, above a maximum reasonable level.

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[15] See appendix C.

(e) *Lawfulness of other provisions of the proposed tariff—escalation formula, shipper-owned cars.*—Protestant contends that the escalation formula contained in the proposed schedule[16] violates section 6(6) of the act and rule 4(i) of Tariff Circular 20 (49 CFR 1300.4(i)(1)) which require that a tariff contain an explicit statement of the applicable rate. Protestant asserts that it is impossible to determine the information needed to apply the formula from the face of the tariff. In addition, protestant points out that the proposed schedule vaguely provides that "[a]ny cost increases caused by new government regulations (except federal income taxes) will be added directly to the rates." Protestant concludes that the proposed escalation formula violates Tariff Circular 20 in that there is no explicit statement of the rates which would apply.

Protestant argues that the escalation provision also violates section 6(3) of the act because it can effect changes in the rate without the required publication and notice. In effect, protestant argues, the escalation formula is an unlawful device to impose contract rates, preempting Commission jurisdiction over changes in the freight rate level for a period of 5 years under section 15(19). Moreover, the wide disparity between the escalating rate ($15.60 as of July 1, 1977) and the nonescalating rate is, in protestant's view, designed to coerce the shipper into utilizing the escalating rates and therefore constitutes an unjust and unreasonable practice.

Protestant also attacks the proposed schedule because it fails to offer rates for application to carrier-owned cars.[17] It is contended that this failure violates the carriers' duty to provide safe and adequate car service. Protestant argues that even where the practice has been for some shippers to supply their own cars the carrier's obligation to provide cars is unaffected.

Protestant further alleges that respondent's restriction of their proposed schedule to transportation in shipper-owned equipment, while holding out such service to other coal unit-train shippers obtaining coal supplies in the same area, violates sections 1(6) and

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[16] See appendix A, item 155.

[17] See appendix A, item 130.

3(1). Docket No. 36114, *Potomac Electric Power Co.* v. *Penn Central*, 356 I.C.C. 815 (1977), cited by respondents, is distinguished on the basis that in that case there was no evidence of other shippers being accorded unit-train rates in carrier-furnished cars.

In response to protestant's allegation that its escalation formula is unlawful, respondents point out that they have not actually filed rate schedules, but have only filed a notice of intent to file rate schedules under section 15(19). They contend that since the notice of intent sets forth a rate in dollars and cents applicable at the time the notice was filed and states a formula by which the rate would be increased on July 1, 1977, and succeeding years, there will never be uncertainty as to the currently applicable rate. If the Commission finds that the proposed rate is not unlawful, respondents state that they will promptly file tariff schedules in compliance with section 6 and 49 CFR 1304(i)(1).

In response to protestant's contention that the proposed schedules unlawfully condition the rate proposals on HL&P's acceptance of the escalation formula, respondents point out that two alternative rates—one subject to escalation, and the other subject to general rate increases—are proposed. Respondents contend that the difference between the two rate alternatives is justified because escalation would protect the railroads from delays and risks inherent in seeking general rate increases. Moreover, respondents argue that escalation provisions are not unreasonable because many shippers, including utilities, have entered into such agreements with the railroads.

In response to protestant's charge that respondents' failure to propose rates applicable to carrier-supplied cars violates section 1(11) of the act, respondents argue that the issue is moot because HL&P willingly contracted to buy cars in February 1977. Recent Commission decisions, including *San Antonio, supra*, and *Potomac Electric Power Co.* v. *Penn Central Transportation Co., supra*, upholding tariffs applicable exclusively to shipper-supplied cars are cited. Respondents state that docket No. 35404, *General American Transp. Corp.* v. *Indiana Harbor*, 357 I.C.C. 102 (1977), does not hold that a carrier is obligated to supply where a shipper's supply is entirely adequate.

DISCUSSION AND CONCLUSIONS

Section 15(19) permits a common carrier by railroad to file a proposed capital incentive rate schedule "whenever the

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implementation of the proposed schedule would require a total capital investment of $1 million or more ***." As a preliminary matter, we agree with protestant's contention that while the burden of proof as to the lawfulness of a proposed capital incentive rate lies squarely with protestant, establishing the existence of the necessary capital investment is a jurisdictional matter which must first be established before the Ex Parte No. 327 procedures become applicable. In a capital incentive proceeding, the proposed schedule is not entitled to consideration under the Ex Parte No. 327 procedures unless there is a sufficiently identifiable effect on the involved traffic to establish a nexus between the investment and implementation of the proposed schedule. Since the Ex Parte No. 327 procedures are a unique departure from traditional ratemaking procedures, it is obvious that the proponent railroad must first establish that it is entitled to their use. Once this is done, however, it is clear that the burden of proof on the merits of the proposed schedule (including the issue of market dominance) is on the protestant, since a proposed capital incentive rate would otherwise become effective automatically absent a prior Commission finding of unlawfulness.

Contrary to protestant's contention, respondents' evidence regarding the purchase of locomotives for the proposed service satisfies the requirement of a reasonably direct effect upon the rail transportation service to which the proposed capital incentive rate applies. Interpreting the language of section 15(19), we have made the following comments:

> Section 15(19) provides incentive for large-scale investment made pursuant to a single, verifiable plan. A schedule proposed under the section must relate closely to such investment. Thus, the investment should have a reasonably direct effect upon the rail transportation service to which the proposed capital incentive rate applies. Ordinarily, eligible capital investment will be for the purpose of promoting innovative or improved service or attracting new traffic. Investment devoted to the preservation of existing levels of service, as for the repair or maintenance of a railroad's general equipment and facilities, in most instances could not be associated with a particular rate modification or new rate; such investment would not be within the purview of section 15(19). [353 I.C.C. 760, 764.]

Since it is clear that the usual practice of railroads offering coal unit-train service is to pool available locomotive power rather than dedicate particular locomotives to a particular service, we do not believe that the total cost of 65 new locomotives should necessarily be considered as qualifying the proposed schedule for capital incentive rate treatment. While we reject an interpretation of section 15(19) that would make "dedication" of plant or equipment (which is the subject of the capital investment) a prerequisite to treatment under section 15(19), there must be a proper allocation between existing and new equipment and a showing that the additional locomotive power is needed for the new service rather than for the carrier to fulfill its statutory obligation. However, in view of the cost of locomotives (in excess of $500,000) and the large number involved here, the threshold requirement of $1 million is clearly met.[8] According to the carriers, over $34 million will be spent on locomotives; it seems reasonable to conclude that at least one thirtieth of their work will be directed toward providing the unit-train service in question.

We believe that a portion of respondents' proposed capital investment for upgrading and expansion of plant attributable to the HL&P movement also qualifies the proposed schedule for capital incentive rate treatment. In this regard, we stated in Ex Parte No. 327, *supra*, at 764-65:

> A shipper, or, for that matter, a railroad investment devoted to rebuilding the main line of a rail line served by many originating or terminating shippers could not ordinarily serve as the basis for rate modifications affecting the multitude of traffic over the main line.
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> * * * * * * *
>
> The distinction drawn between [capital investments involving specific traffic and rates applicable thereto of the railroad(s) on whose lines the investment takes place and capital projects that affect the general run of the investing railroad(s) business] is a relevant one. We agree that systemwide rate modification predicated upon major investment affecting traffic generally was not contemplated as within the scope of section 15(19). The expedited procedures prescribed in section 15(19) and in the regulations herein adopted were not intended to accommodate a proceeding in the nature of a general rate increase. Only capital investment projects having an identifiable effect upon specific traffic would satisfy the requirement of a nexus between the investment and the implementation of the proposed schedule.

Protestant's witnesses state that HL&P's coal unit-train traffic could move tomorrow without improvements and that any new improvements would benefit all system traffic. We find respondents' position on the need for upgrading main line roadway to accommodate HL&P's heavy, high volume coal unit-trains more credible. However, the issue here is whether the respondents have demonstrated that a portion of the incremental investment in upgrading and expansion of their plant—concededly investment that will benefit all "new" large-volume coal traffic moving over respondents' lines in the future—can be attributed specifically to the HL&P movement to establish "an identifiable effect" upon that traffic and establish a nexus between the investment and implementation of the proposed schedule. Respondents have made such an allocation (including only current 1976 and 1977 expansion costs), based upon projected gross tonnages of high-volume unit-train coal movements.[19] Protestant contests the basis of that allocation, arguing that the gross tonnage projections and the allocations of those tonnages among new coal shippers including HL&P is unsupported by evidence of record.

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[8] We have recognized elsewhere that new unit-train coal service requires additional locomotives and cabooses. See, *e.g.* *San Antonio*, *supra*, at 415.

Nevertheless, respondents' allocation does not appear to be unreasonable. Even allowing for imprecisions in the basis of that allocation, we find that respondents have adequately demonstrated that far in excess of $1 million can be fairly allocated to the HL&P movement.

In summary, we believe that the magnitude of the proposed movement of coal and concomitant capital investment involved here clearly establishes that the schedule is qualified for capital incentive rate treatment. Unit-train movements of smaller dimensions may warrant closer scrutiny of the connection between the proposed capital investments and schedules.

Since the only challenge[20] to the proposed capital incentive rates is that they exceed a maximum reasonable level, section 1(5)(b) of the act requires that a finding of market dominance be made before the rates can be held to exceed a maximum reasonable level.

To aid in making determinations as to market dominance, we have established the three rebuttable presumptions of market dominance cited by protestant. In our interim report in Ex Parte No. 320, served August 23, 1976, we noted, at page 99, that the essential question was "whether there exist sufficient commerically feasible and reasonably available transportation alternatives from other *** carriers or modes to insure that a rate increase by any competing carrier will result in more than a de minimus diversion of demand for transportation service during the period in which the rate in issue will be in effect." In both the interim report and the final report, served October 1, 1976, in Ex Parte No. 320, we stressed that the presumptions are not the exclusive means of proving market dominance.

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[19] See appendix D.

[20] Although protestant has alleged that the proposed schedule would unlawfully discriminate against it, no supporting evidence is presented. General declarations as to competition or injury unsupported by evidentiary facts will not support a finding of discrimination or undue preference or prejudice under section 2 or section 3(1) of the act.

Accordingly, although the market share presumption is literally inapplicable to new movements, the fact that all of the subject traffic will be handled by the respondents is clearly an important factor. No evidence has been presented which would indicate that respondents will control less than 70 percent of the market from Cordero to Smithers Lake once actual movements commence. We reject respondents' contention that the past competitive circumstances surrounding other possible sources of coal should be considered. While the decision to ship from the Jacob's Ranch Mine may well have been arrived at in a competitive atmosphere, once protestant made that commitment and agreed to a supply contract it could not change origins. This being the case, "market competition" provides little protection to the shipper if the railroads were to attempt to exact an unreasonably high rate.

There is no dispute that BN is the only carrier which is able to provide rail service to the mine and that the Santa Fe is the only carrier serving HL&P's plantsite. In addition, protestant has purchased specially designed freight cars to transport the coal. Although no information has been submitted concerning the ease or difficulty with which these might be disposed of if protestant wished to switch to another mode, the evidence clearly establishes that no rail competition exists and the heavy-loading characteristics of the coal traffic as well as the location of the mine makes competition from any other mode not feasible. The mere speculation that a coal slurry pipeline might someday be built is not sufficient unless the threat becomes an impending reality. We cannot say that this evidence of potential competition is sufficient in the absence of concrete evidence that actual steps have been taken toward its institution. Accordingly, we find that respondents have market dominance over the issue traffic.

In determining the lawfulness of rates, we will give consideration to comparisons with established rates on the same commodity transported in the same or similar territories under like circumstances. Both parties have submitted evidence of allegedly comparable rates on coal moving in high-volume unit-train service to electric generating facilities. These rates,[21] with selected data, are set out in appendix C.

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[21] Only six of numerous rates introduced by protestant are included in appendix C. These six are viewed by protestant as "extremely comparable" to the HL&P movement.

BEST DOCUMENT AVAILABLE

Five of protestant's six[22] most comparable rates appear to present a valid basis for comparison in terms of origin, route of movement, car ownership, high annual volume, distance, tonnage per train, and loading and unloading time. The average rate of 7.6 mills per ton-mile is 2.1 mills lower than 9.7 figure for the proposed rate. However, respondents' contention than protestant's allegedly comparable rates are either depressed or outdated, or both, cannot be ignored. In *Burlington Northern, Inc.* v. *United States,* 555 F. 2d 637 (1977), the Court rejected a similar claim by the carriers because it was unsupported in the record. In this proceeding, respondents have introduced voluminous testimony on the impact of inflation on railroad costs, the increased value of coal in recent years as an energy source, the increased demand for its transportation, and the resultant change in competitive factors which affect negotiations for transportation rates. Specifically, respondents have produced evidence that the base rates on four of protestant's comparative rates (to destinations in Pueblo, Colo.; Amarillo, Tex.; Welsh, Tex.; and Jeffrey, Kans.) were negotiated prior to the OPEC oil embargo and the energy crisis of late 1973 and 1974,[23] developments which have enhanced the attractiveness (and price) of coal as an energy source because of the rapid increases in the price of other fuels. In addition, there is evidence that the Amarillo and Pueblo rates, when negotiated, were depressed by competition from closer Colorado and New Mexico coal sources and that respondents are currently seeking to renegotiate these rates. These factors must be considered in weighing the value of protestant's comparisons.

We agree with protestant that respondents' rate comparisons, with one exception, do not provide a valid basis for comparison with the rates proposed in this proceeding. The two rates on coal shipments from Gallup, N. Mex., to Joseph City, Ariz., involve a distance of only 117 miles as opposed to the instant 1,607-mile movement. The rates from Gallup, N. Mex., to Trona, Ariz., and from Converse, Colo., to Gary, Ind., move annual volumes of only 375,000 and 600,000 tons respectively, as opposed to the movement of 5,200,000 tons per year involved in this case. The disparities in terms of distance and annual tonnage between those rates and the proposed rates are so great as to render them of little probative value as bases for comparison.

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[22] The rate on unit-train coal traffic from Cordero, Wyo., to Elmendorf, Texas was prescribed by the Commission in *San Antonio, supra,* so that movement of coal could commence to meet the shipper's needs. We expressly stated that as actual experience was gained, the rate would be subject to modification upon petition of either party. By order of the Commission, served October 27, 1977, that proceeding has now been reopened. In light of the uncertainty at this time as to the reasonableness of the rate previously prescribed, we believe it would be inappropriate to use it as a basis of comparison here.

[23] Protestant contends on rebuttal that the effective date of these comparative rates are all very recent, post dating the energy crisis. However, the current rates have increased under escalation formulae since the original base rates went into effect. Respondents contend that the base rates were negotiated under completely different competitive circumstances than exist today. Therefore, these rates, even at current levels, are not a valid basis for comparison, particularly in view of respondents' continuing attempt to renegotiate them at higher levels.

The currently effective rate on unit-train coal movements from Belle Ayr, Wyo., to Amsterdam, Mo.[24] is, however, sufficiently comparable to merit consideration. Although distance and annual volume are considerably less than the HL&P movement, the mileage and 1,600,000 ton minimum are high enough to make the traffic very attractive to the carrier. It is otherwise comparable in terms of origin point, car ownership, minimum tons per unit-train, distance of movement, and loading and unloading time. The current rate of $8.53 per net ton yields approximately 9.8 mills per net ton-mile—approximately 0.1 mill higher than would the proposed rate of $15.60. However, the proposed rate of $16.54 would yield approximately 10.3 mills per ton-mile—($0.013) which is considerably higher in light of the larger volume and longer haul involved in the HL&P traffic.

We are mindful that rates are unlawful only if they exceed the zone of reasonableness. The existence of many rates within the zone can support no inference as to what the maximum reasonable rate should be. Moreover, any reliance on rate comparisons must be measured against the statutory policy evinced by the 4R Act. It is clear that Congress intended that the railroads be given increased ratemaking flexibility, even where they possess market dominance, so long as their rates are not unreasonably high or otherwise unlawful. We believe respondents' Amsterdam rate is the most comparable since its recent (October 13, 1977) effective date most closely reflects the current value of coal and its transportation. Protestant's comparisons, though established under different market conditions, point to the existence of a broad zone of reasonableness. Given the clear statutory intent, it would be inappropriate to force respondents toward the lower end of that zone, as protestant would have us do. We conclude that the Amsterdam rate, although not conclusive in and of itself, is one indicium that the $15.60 (although not the $16.54 rate) is within the zone of reasonableness.

In Suspension Case No. 66841, the Commission's Suspension and Fourth Section Board voted not to suspend this rate. That decision was affirmed by division 2 on June 30, 1977. The current rate of $8.53 per net ton became effective October 13, 1977.

As noted, evidence presented by the parties on the relationship between the cost of service and the proposed rates has proved the most controversial issue on this record. In our restatement of costs in appendix B, we have rejected the inclusion of equity capital costs in our computation of variable costs. Respondents' use of an 11-percent (after tax) rate of return on the original cost basis does not technically reflect variable costs. In recent years, we have recognized net investment (original costs less depreciation) to determine the cost base. In ***Rules To Govern Assembling & Presenting Cost Evidence***, 337 I.C.C. 298, 393 (1970), we held, after repeatedly emphasizing that costing is not to be confused with ratemaking, that the actual interest rate the railroads are paying on their existing debt is the proper factor to be applied to debt plus equity capital to determine variable costs. Accordingly, our restatement of the estimated cost reflects an allowance for cost of capital on the net investment basis utilizing the various embedded debt rates submitted by protestant. Our restatement of the locomotive diesel unit and caboose capital costs reflects our use of a 7.85 percent return based on the average interest for equipment trust certificates. However, consistent with the underlying methodology in the ***San Antonio*** case, ***supra,*** we have accepted respondents' inclusion of incremental costs of fixed plant investment for 1976 and 1977.[25]

Our restatement yields a variable cost figure of $9.59 per net ton and a fully allocated cost figure of $12.86 per net ton, using the ratio or dollar method. The $15.60 rate is thus 163 percent of variable costs and 121 percent of fully allocated costs, while the $16.54 rate is 172 percent of variable costs and 129 percent of fully allocated costs.

In rejecting respondents' use of an 11-percent rate of return in their costing methodology, we do not suggest that the current cost of equity capital should not be considered in the determination of the reasonableness of the proposed rate. As we noted in ***Rules to Govern Cost Evidence, supra,*** at page 393:

> Allowances for return on investment *** to the extent that they are admittedly intended to serve as an encouragement and incentive for continued or new risk bearing ownership, are in the nature of so-called pure economic profits and should not be taken into account as an element falling within the restrictive construction to

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There is no question that the tremendous volume of coal involved here will require substantial upgrading of fixed plant investment to handle the traffic safely and efficiently. Respondents' allocation of the portion of this incremental investment attributable to HL&P is based on projected annual tonnage moving over respondents' lines and does not appear unreasonable.

> be given here to costs. *This is not to say, however, that such an allowance for profit is not to be considered as a factor in ratemaking—it should if transportation is to remain under private ownership and control ****.
>
> However, this so-called pure profit should be clearly distinguished from opportunity costs. The latter does include a return on investment, simple, in the sense of, and as the equivalent to, cost of capital, but in no way connected with the risk or incentive of ownership. It is with respect to this limited effect to be given to return on investment as an element of cost that the examiner generally agrees *** as to why equity capital invested in carrier facilities should be treated in the same manner as similar debt capital. Such equity capital is then entitled to receive imputed interest, similar to that charged for borrowed money.

As the italicized language indicates, this narrow construction may be appropriate for cost-finding purposes, but does not preclude other ratemaking considerations in appropriate cases. We are convinced that the consideration of rail need to attract equity investment is appropriate in a capital incentive rate proceeding.

Section 205 of the 4R Act had a dual effect: it made sections 15a(2) and (3) of the act inapplicable to railroads as of February 5, 1976, and it set forth a new rule of ratemaking to be applied to the railroads in section 15a(4). That section provides:

> With respect to common carriers by railroad, the Commission shall, *within 24 months after the date of enactment*, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support present capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels ***.

As the italicized language indicates, we have until February 5, 1978, to adopt standards and procedures to assist the railroads to attain adequate revenue levels. We are presently considering a wide variety of issues relating to this problem in a rulemaking proceeding, Ex Parte No. 338, *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels*. It would be inappropriate in the context of this proceeding to prescribe standards for future application which might prejudge the issues in that proceeding. This is particularly true in light of proposals in Ex Parte No. 338 that overall revenue need should not be considered in individual cases such as this but rather in independent proceedings. However, although the statute does not technically require application of adequate revenue considerations prior to February 5, 1978, the intent of Congress is clear and we should affirmatively assist that policy to the extent possible pending the outcome of Ex Parte No. 338.[26] This policy is particularly strong in a capital incentive rate proceeding. Congress clearly intended to encourage large-scale rail investment in an effort to improve physical facilities, operations, and structure and infuse badly needed equity capital into the railroad industry.

Since we must determine a revenue need factor in the absence of the Ex Parte No. 338 standards or a record sufficient to suggest a more precise methodology, we are forced to use proxy tests as indicia of revenue need. One measure of comparision[27] would be use of respondents' suggested 11 percent cost of capital in our restated computation of costs to permit recovery of fully allocated costs plus return on investment on both variable and fixed portions of road property and equipment. A rate set at this level would be no higher than $16.07 per net ton.[28] Another possible comparison would be to take our restated fully allocated cost measure of $12.86 and add a weighted before-tax rate of return factor to it. For illustrative purposes we have used respondents' 11-percent after-tax figure which converts to a before-tax rate of 19.31 percent for the BN and 19.56 percent for Santa Fe (or a weighted 19.36 percent based on relative mileage of each in this movement). Application of this admittedly imprecise approach results in a figure of $15.35 per net ton.

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[26] Unlike the situation in Ex Parte No. 334, *Car Service Compensation—Basic Per Diem Charges*, 358 I.C.C. 715 (1977), where the record was developed sufficiently to permit the adoption of an interim approach with respect to car-hire, the treatment of cost of capital in rate cases must await outcome of Ex Parte No. 338. Protestant has submitted computation of alleged levels of rate of return which the proposed rates would yield, using the so-called Discounted Cash Flow method. Respondents have moved to strike this portion of protestant's reply statement, but we decline to do so since it was submitted in reply to respondents' assertions concerning the rate of return of the proposed rates. However, the method used by protestant is unusable because it does not sufficiently explain the various factors used. In addition, it appears to assume without reason that the involved incremental capital costs are the full extent of fixed costs attributable to this movement, and the approach appears inconsistent with the procedures and rate data reporting requirements set forth in Ex Parte No. 290, *Procedures Governing Rail General Rate Increase Proc.*, 351 I.C.C. 544 at 589-90, 619-21, as well as any other reliable methodology for calculating a weighted-average cost of capital or rate of return.

[27] These proxy measures would, if anything, contain overstatements. Their imprecision mitigates against their use as an absolute measure. Accordingly, they are used here for illustrative purposes only.

[28] This is based on a recomputed variable "cost" level of 11.98 per net ton.

Taking all of these factors into consideration, we do not believe the proposed $16.54 rate to be just and reasonable. None of respondents' rate comparisons justify a rate at this level. Our restatement of costs (see appendix B) shows that this rate would equal 172 percent of variable costs and 129 percent of fully allocated costs. The record substantiates protestant's objection that the proposal of the $16.54 rate is a mere tactic to obtain protestant's agreement to an escalation clause at a lower rate. Moreover, we agree with protestant that the difference between the two rates is not justified as respondents claim, by delays and risks involved in seeking general rate increases. The difference between the two rates would amount to $11,800,000 per year on an annual volume of 5 million tons—a disparity which indicates that the alternative rate is designed to coerce HL&P into agreeing to respondents' escalation formula. In this regard, we note that a long period of unsuccessful negotiations preceeded the filing of the notice of intent, and resulted in the filing of a complaint by HL&P on May 6, 1977, in docket No. 36579. That complaint is presently pending.

Accordingly, when the relationship of the proposed $15.60 rate to variable cost is considered, together with evidence of other comparable rates and indicia of rail revenue need, and when the high value of transportation service of coal is taken into account, this rate does not appear to exceed a maximum reasonable level, although it is in the higher part of the zone of reasonableness. However, under any approach, the $16.54 rate is clearly unreasonably high, under the transportation circumstances here involved.

Since we have found that the $15.60 rate level would not be unreasonably high, we must consider whether the escalation clause or any other part of the proposal is unlawful. If any part of a proposal made under section 15(19) is held unlawful, those parts which are held lawful may nevertheless be published so long as they comply with section 6 of the act and our tariff publishing regulations.

With respect to the dual rate structure contained in respondents' proposed schedule, it must be noted initially that they have filed only a notice of intent to publish rate schedules under section 15(19); they have not yet filed a rate schedule under section 6 of the act. Clearly, if respondents choose to file a schedule in accordance with this decision, rule 4(i)(1) of Tariff Circular No. 20 (49 CFR 1304 (i)(1)) requires that the tariff clearly state the applicable rate. Under existing circumstances, we cannot sanction the publication of a rate subject to an escalation formula. The fact that many shippers, including many utilities, have agreed to such formulae in lieu of general rate increases does not make such a practice mandatory.[29] While the Commission has found that unit-train coal rates subject to private *agreement* based on escalation formulae were not violative of the act,[30] no justification appears in this instance for imposing such a formula upon this shipper. Our comments in Ex Parte No. 327, *supra,* that parties may prefer to predetermine a formula for rate adjustment as an alternative to ex parte general increases does not support mandatory imposition of such a formula in a capital incentive rate case. Nor is the fact that HL&P passes costs on directly to its own customers in the form of "fuel adjustment" and "cost-of-services" clauses relevant to the issue here. We, therefore, find that imposition of the escalation formula proposed by respondents would constitute an unlawful and unreasonable practice under these circumstances.[31].

We find no merit in protestant's contention that respondents' failure to propose rates applicable to carrier-supplied cars violates sections 1(11) and 3(1) of the act. The cost of cars has not been considered in respondents' presentation of cost evidence. As we noted in *San Antonio, supra,* with regard to unit-train rates the shipper usually furnishes cars which are generally of a larger (100 tons) capacity than standard coal cars, in order to foster more efficient and economical operations. Here, protestant has already contracted to purchase specialized equipment, and there is no evidence it was coerced into this action.

Finally, protestant's allegations that the proposed rates constitute an unreasonable prejudice, disadvantage and discrimination in violation of section 3(1) of the act are without merit. Protestant's only evidence on the issue consists of the rates which it has offered on the issue of comparability—rates which, in mills per ton mile, are lower than the rates proposed here. In *San Antonio, supra,* at 417, we stated:

> A mere difference in rates, standing alone, does not demonstrate unlawfulness under section 3 of the act. *** general declarations as to competition or injury unsupported by evidentiary facts *** will not support a finding of undue preference and prejudice, see *Koppers Co., Inc.* v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 391.

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[29] See *San Antonio, supra,* at 417.

[30] Ex Parte No. 318, *Increased Freight Rates and Charges—1976,* order served March 2, 1977.

[31] As we noted in Ex Parte No. 327, *supra,* at page 775, where the parties have not agreed to an escalation formula the railroad may publish increases of the capital incentive rate within the 5-year period (or thereafter) subject to normal suspension and investigation procedures under section 15(8) of the act.

While the record indicates that respondents likely will make capital investments of at least $1 million, respondents' failure to adequately document the present use of their existing pool of locomotives leads to uncertainty as to the precise size of the required investment. We, therefore, believe that status reports which set out in detail the actual investments made would be appropriate here. Accordingly, this proceeding shall remain open for the limited purpose of receiving these reports, commencing 1 year from the effective date of any schedule found lawful herein. The reports should detail the specific investment(s) actually made, with identifying details of each, the dollar amount actually spent on each such investment, and the extent to which investments set forth by respondents herein were not actually made and the reasons therefor, together with any additional information respondents deem relevant.

The carriers should in such status reports allocate the amounts of each expenditure attributable to the issue traffic. The parties should be aware of the Commission's responsibility to insure that the requirements of the 4R Act triggering the protections of section 15(9) have been met. If it appears that the minimum expenditures have not been made, or that the expenditures made are not attributable to the issue traffic, then the Commission will be required to take appropriate action. Options available in that event would, of course, include a finding that the incentive rate protections do not apply.

We find:

(1) Respondents have shown that they must make capital investments far exceeding $1 million because of the unit-train movements of coal from Cordero to Smithers Lake;

(2) Respondents have market dominance over the issue movements;

(3) The proposed rate of $16.54 per net ton exceeds a maximum reasonable level;

(4) The proposed rate of $15.60 per net ton is just and reasonable and not otherwise unlawful, but the proposed escalation clause on this rate is unlawful in the absence of bona fide agreement by the parties;

(5) This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER GRESHAM, concurring in the result.

COMMISSIONER CHRISTIAN, concurring in part:

I am in general agreement with the decision of the majority. However, I do not agree with the majority's conclusion that the proposed escalation clause is unlawful simply because there has been no bona fide agreement between HL&P and the railroads to its inclusion in this tariff proposal. I believe that a properly drawn escalation clause may be just and reasonable irrespective of whether a shipper agrees to its terms. However, in my opinion this particular escalation clause should be found unlawful because the new governmental regulation cost formula is ambiguous and unquantified. If this defect were cured, I would be prepared to find the escalation clause just and reasonable.

I also do not agree that our analysis of the tariff proposal under section 15(19) requires an allocation between existing and new equipment and a showing that the additional equipment is needed for the new service rather than for the carrier to fulfill its statutory obligation. In my opinion, the threshold requirement of section 15(19) is met when the carrier's expenditure to perform a new service meets the $1 million figure.

It is ordered, That respondents may file a rate on the subject traffic and movements, not to exceed a level of $15.60 per net ton,[32] subject to the findings and conclusions in this report and order, at any time within 180 days after the date of service of this report and order, to become effective on 30 days' notice. A schedule filed in compliance with this order may not, for a period of 5 years after its effective date, be suspended or set aside as unlawful under sections 1, 2, 3, or 4 of the act, except that the Commission may at any time order such schedule to be revised to a level equaling the variable costs of providing the service, if the rate stated therein is found to reduce the going concern value of the carriers.

It is further ordered, That should respondents file a schedule based on provisions found lawfal herein, they shall submit a detailed status report to the Commission 1 year from the effective date of any such schedule. This report shall state the specific qualifying investments actually made as of the date the report is filed, together with the amount actually spent on each investment, and shall also state the extent to which investments set forth by respondents herein were not actually made and the reasons therefor. The original and five copies of this report shall be served on the Commission and a copy shall be served on all parties to this proceeding. The first page of the report shall specifically refer to the title and docket number of this proceeding. The Commission reserves the right to order such additional reports as may become necessary during the effectiveness of any such schedule.

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[32] Subject, as previously discussed, to imposition of general increases. See Ex Parte No. 327, *supra.*

This proceeding shall remain open for the limited purpose of receiving such reports.

REDUCTION

ICC 485

BURLINGTON NORTHERN INC.

In Connection With

THE COLORADO AND SOUTHERN RAILWAY COMPANY
FORT WORTH AND DENVER RAILWAY COMPANY
THE ATCHISON TOPEKA AND SANTA FE RAILWAY COMPANY

FREIGHT TARIFF 278

JOINT FREIGHT TARIFF

PROVIDING

UNIT TRAIN ALL-RAIL

RATES

ON

COAL, CARLOADS

FROM		TO	
CORDERO	WYOMING	SMITHERS LAKE	TEXAS
JACOBS JCT	WYOMING		

This tariff does not apply on Intrastate traffic.

COAL TARIFF

NOTICE

The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

ISSUED NOVEMBER 30, 1977 EFFECTIVE DECEMBER 30, 1977

Provisions named herein authorized by Commission order served November 30, 1977, Docket No. 36608 in conformity with 49-CFR 1109.20.

Issued by
H. H. KIRCHOFF,
Manager, Rate Publications
176 East Fifth Street
ST. PAUL, MN 55101

BN Tariff 278

RULES AND OTHER GOVERNING PROVISIONS

GENERAL RULES AND REGULATIONS

Item	Subject	Application
10	Station Lists and Conditions	This tariff is governed by the Official List of Open and Prepay Stations 92, (Station List Publishing Company, Agent), I.C.C. A-57, to extent shown below: **PREPAY REQUIREMENTS AND STATION CONDITIONS** For additions and abandonments of stations, and except as otherwise shown herein for prepay requirements, changes in names of stations, restrictions as to acceptance or delivery of freight, and changes in station facilities. When a station is abandoned as of a date specified in the above named tariff, the rates from and to such station as published in this tariff are inapplicable on and after that date.
20	Reference to Tariffs, Items, Notes, Rules, Etc.	Where reference is made in this tariff to tariffs, items, notes, rules, etc., such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.
35	Transfer Between Connecting Carriers	The joint rates published in this tariff include all charges for switching, drayage, or other transfer services at intermediate interchange points on shipments handled through and not stopped for special services at such interchange points.
40	Consecutive Numbers	Where consecutive numbers are represented in this tariff by the first and last number connected by the word "to" or a hyphen, they will be understood to include both of the numbers shown. If the first number only bears a reference mark, such reference mark also applies to the last number shown and to all numbers between the first and last numbers.
45	Capacities and Dimensions of Cars	For marked capacities, lengths, dimensions and cubical capacities of cars, see Official Railway Equipment Register (National Railway Publication Company, Agent), ICC-RER 405.
60	National Service Order Tariff	This tariff is subject to provisions of various Interstate Commerce Commission Service Orders and General Permits shown in National Service Order Tariff 1-F, WTL ICC A-4954.
75	Method of Cancelling Items	As this tariff is supplemented, numbered items with letter suffixes cancel correspondingly numbered items in the original tariff or in a prior supplement. Letter suffixes will be used in alphabetical sequence starting with A. EXAMPLE: Item 100-A cancels Item 100, and Item 200-B cancels Item 200-A in a prior supplement, which, in turn, cancelled 200.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

GENERAL RULES AND REGULATIONS

Item	Subject	Application
80	Intermediate Application-Origin	Applicable only in connection with rates which are dependent in their application upon the movement of a stated volume during a specified period of time. Subject to the provisions of Notes 1, 2, 3 and 4 below, from any point of origin from which a commodity rate on a given article to a given destination and via a given route is not named in this tariff, which point is intermediate to a point from which a commodity rate on said article is published in this tariff via a route through the intermediate point over which such commodity rate applies to the same destination, apply from such intermediate point to such destination and via such route the commodity rate in this tariff on said article from the next point beyond from which a commodity rate is published herein on that article to the same destination via the same route. NOTE 1.—The rate from the intermediate point authorized by this rule is subject to the same conditions to which the rate from the next point beyond is subject. NOTE 2.—When by reason of branch or diverging lines there are two or more "next beyond" points, apply the rate from the next point beyond (in this tariff) which on that article to the same destination via the same route results in the lowest charge. NOTE 3.—If the intermediate point is located between two points from which commodity rates on the same article via the same route are published in this tariff, apply via that route from the intermediate point the rate from the next point in either direction which results in the higher charge. In applying this note, if there are two or more next beyond points due to branch or diverging lines, eliminate all such next beyond points except the point from which the lowest charge is applicable. NOTE 4.—If there is in any other tariff a commodity rate on the same article dependent in its application upon the movement of a stated volume in unit train during a specified period of time, from the intermediate origin point applicable over the same route to the same destination, the provisions of this rule are not applicable from such intermediate origin point.
85	Intermediate Application-Destination	Applicable only in connection with rates which are dependent in their application upon the movement of a stated volume during a specified period of time. Subject to the provisions of Notes 1, 2, 3 and 4 below, to any point of destination to which a commodity rate on a given article from a given point of origin and via a given route is not named in this tariff, which point is intermediate to a point to which a commodity rate on said article is published in this tariff via a route through the intermediate point over which such commodity rate applies from the same point of origin, apply to such intermediate point from such point of origin and via such route the commodity rate in this tariff on said article to the next point beyond to which a commodity rate is published herein on that article to the same destination via the same route.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

GENERAL RULES AND REGULATIONS

Item	Subject	Application
85	Intermediate Application-Destination—Continued	NOTE 1.—The rate to the intermediate point authorized by this rule is subject to the same conditions to which the rate to the next point beyond is subject. NOTE 2.—When by reason of branch or diverging lines there are two or more "next beyond" points, apply the rate to the next point beyond (in this tariff) which on that article to the same destination via the same route results in the lowest charge. NOTE 3.—If the intermediate point is located between two points to which commodity rates on the same article via the same route are published in this tariff, apply via that route to the intermediate point the rate to the next point in either direction which results in the higher charge. In applying this note, if there are two or more next beyond points due to branch or diverging lines, eliminate all such next beyond points except the point to which the lowest charge is applicable. NOTE 4.—If there is in any other tariff a commodity rate on the same article dependent in its application upon the movement of a stated volume during a specified period of time, to the intermediate destination applicable over the same route from the same origin, the provisions of this rule are not applicable to such intermediate destination point.
100	Method of Denoting Reissued Matter in Supplements	Matter brought forward without change from one supplement to another will be designated as "Reissued" by a reference mark in the form of a square enclosing a number, the number being that of the supplement in which the reissued matter first appeared in its currently effective form. To determine its original effective date, consult the supplement in which the reissued matter first became effective.
105	Definition of Ton	Where the term ton is used in this tariff it means ton of 2,000 pounds.

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
110	Industries from Which Rates Named in Item 200 Apply	Provisions published herein apply from the Kerr-McGee Mine at Jacobs Jct., Wyoming and/or from the Sunoco Energy Development Co. mine at Cordero, Wyoming to the Houston Lighting and Power Co. at Smithers Lake, Texas.
120	Demurrage	This tariff is not subject to provisions of Agent D. M. Rogers' Tariff 4-K, ICC H-74, nor Agent D. M. Rogers' Tariff 8-O, ICC H-30.
125	Weighing	Rates in this tariff do not include weighing of loaded cars by carriers. Weights to be used for assessment of freight charges shall be those ascertained at origin by consignor, subject to supervision and verification by the Western Weighing and Inspection Bureau, and furnished by consignor to the railroads for this purpose.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
130	Furnishing Cars and Minimum Tenders	Except as otherwise provided in Item 133, rates in this tariff apply only on shipments tendered to BN in open top cars with rotary couplers having marked capacity of not less than 200,000 pounds, furnished by consignee at no expense to the railroads parties to this tariff, loaded to full visible capacity, subject to per shipment tenders of not less than 105 cars (See Exception and Note), on one bill of lading at one time from one consignor at one location at one origin, to one consignee for one delivery at one time at one location at one destination. No allowance will be paid by the carriers to the consignor, consignee or owner on such cars. Car maintenance will be borne by consignor, consignee, owner or lessee of such equipment. This tariff is not subject to the provisions of Agent D. M. Rogers' Tariff 7-F, ICC H-68. EXCEPTION.—In the event consignee is unable to furnish for loading at least 105 cars (See Note) because cars have been damaged, destroyed or derailed by carrier requiring removal from service, and the carrier is unable to substitute carrier equipment under provisions of Item 133, the per shipment minimum tender of 105 cars shall be reduced by the number of cars carrier is unable to substitute under provisions of Item 133, but the minimum per shipment tender shall in no case be less than 90 cars. NOTE.—If sufficient empty cars are not available for loading to meet the minimum tender requirements of this item, carrier will accept loaded cars tendered with charges to be assessed based on actual tons loaded as determined under provisions of Item 125 plus 98 tons per car for each car short of the minimum tender requirements. Such deficit weight will be considered as tons received in meeting the minimum annual volume requirements named in this tariff.
132	Empty Movement	Rates herein include return movement of the train of empty cars from a destination in this tariff to the same mine at an origin in this tariff.
133	Carrier Equipment	When cars furnished by consignee under Item 130 are damaged, destroyed (See Note 2) or derailed by a carrier participating in this movement, requiring removal from service, that carrier will furnish, if available, open top cars of not less than 200,000 pounds nominal marked capacity for each such car damaged, destroyed (See Note 2) or derailed pending repair and replacement in service, each substituted carrier owned car to be loaded to full visible capacity. Rates in Item 200 will apply on tonnage loaded in such cars furnished by the carrier (See Notes 1 and 3). Tonnage moving under the provisions of this item will be used to make up the annual volume tonnage requirements of this tariff.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
133	Carrier Equipment—Continued	NOTE 1.—Carrier must furnish written notification to consignee that its cars (designating them by car initial and number) were damaged, destroyed (See Note 2) or derailed on (month-day-year) and will upon written request (See Note 3) by the consignee furnish railroad owned cars of like capacity, if available, until such time as the damaged, destroyed (See Note 2) or derailed car or cars are repaired and/or replaced in service. NOTE 2.—If cars are destroyed, carrier will substitute railroad car, if available, for a period of not to exceed 300 days following settlement of claim for such cars, but in no case is period to exceed 365 days following date of actual destruction. Consignee must present evidence to carrier within 60 days following settlement of claim that cars have been purchased or leased to replace those destroyed. NOTE 3.—The consignee shall confirm request for the substitution of railroad owned cars within 30 days of the date damage or destruction occurred to consignee furnished cars and shall furnish a certificate stating: "This is to certify that on (month-day-year) the following cars furnished by consignee (list car numbers) were damaged or destroyed and are being taken out of service to be either repaired or replaced, and confirms our request that carrier cars, if available, be furnished under the provisions of Item 133, BN Tariff 278, ICC 485."
135	Loading and Unloading	Consignor will at its expense perform the loading of the cars at loading point. The origin carrier will move empty cars under the loading spouts at consignor's loading facilities at a controlled speed during the process of loading the cars. Consignee will at its expense perform the unloading of cars at consignee's unloading facilities at destination.
137	Facilities	Consignors and consignees will provide facilities at origin and destination to permit receipt by BN and delivery by ATSF of trainload shipments contemplated herein.
138	Advance Notice of Arrival of Cars at Loading Point	The ordering of cars in the case of a shipment under this tariff will not be required. Cars will be made available for loading immediately upon arrival at origin point. The agent of the origin carrier will furnish the consignor not less than four (4) hours advance notice by telephone of the arrival of said cars at origin loading point. Agent of the origin carrier will keep a running record of the hour and minute that advance notice was furnished.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
140	Loading Time and Origin Detention	1.—All loaded cars in each shipment shall be tendered to the BN for movement to destination within four (4) hours after actual placement by the BN of first empty car at consignor's loading facility to load by consignor or within four (4) hours after notice of constructive placement (see Paragraph 2). 2.—When actual placement of all empty cars for loading cannot be made on account of the inability of the consignor to receive them, or because of any other condition attributable to the consignor, such cars will be held at origin, or, if they cannot be accommodated at origin, at an available hold point short of origin and notice shall be sent or given to the consignor that the BN is unable to place all the empty cars for loading. This will be considered constructive placement. (See Note) 3.—After the expiration of the free time in Paragraph 1 above, the consignor will be assessed a charge of $150 per hour for each hour or fraction thereof for all cars in the shipment for delay of shipment in excess of the free time limit. In the event any of the disabilities referred to in Paragraph (h) of Item 150 including carrier's mechanical failure or other train delay directly attributable to carriers prevents consignor from loading shipment, the free time will be extended for an additional period equivalent to the time such disability prevents such consignor from loading. Carrier's Agent must be notified in writing within ten days of the type of disability which prevented such loading including the time and date such disability originated and terminated. NOTE.—If, at carrier's option, empty cars are held short of origin, time required for movement of said cars from hold point to origin to consignor's loading facility will not be included in the computation of free time.
145	Unloading Time and Destination Detention	Four (4) hours free time will be allowed for unloading all cars included in a unit train shipment, the free time to be computed from the time of actual or constructive placement of all cars in such consignment. Actual placement is made when all cars of the unit train consignment have been placed in position on consignee's receiving track facility. If such actual placement is prevented due to any cause attributable to the consignee, the cars shall be considered constructively placed (See Note 1). After the expiration of the free time allowed in the preceding paragraph, the consignee will be assessed a charge of $250 per hour for each hour or fraction thereof for unit train delay in excess of the free time limit. In the event any of the disabilities referred to in Paragraph (f) of Item 150, including the use of carrier furnished substituted cars (see Item 133) prevent consignee from unloading shipments, the free time will be

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
145	Unloading Time and Destination Detention—Continued	extended for an additional period equivalent to the time such disability prevents consignee from unloading. Carrier's Agent must be notified in writing within ten days of the type of disability which prevent such unloading including the time and date such disability originated and terminated. NOTE 1.—When actual placement of all loaded cars in a consignment cannot be made because of any condition attributable to the consignee, such cars will be held at an available hold point and constructive placement notice shall be sent or given to the consignee within 24 hours after arrival of cars at hold point. This will be considered constructive placement.
150	Application of Rates	(Applicable only where specific reference is made to this item) (a) Except as otherwise provided in Paragraph (f) and subject to the provisions of this item, rates in item making reference to this item are applicable only on shipments from consignors at one or more origins in such item, to a consignee who receives at one destination in such item not less than the volume requirement specified in Paragraph (b) below of one or more of the commodities named in items referring to this item. VOLUME REQUIREMENT (b) 4,000,000 tons received during the 12-month period commencing with the date of written notification to the BN and ATSF and thereafter during 12-month periods commencing with the anniversary day of the first 12-month period. (c) Initially, the rate in items making reference to this item shall be charged. (d) If during any 12-month period described in Paragraph (b), the tonnage required of a consignee is not met, rate in items making reference to this item shall not be applicable on shipments that have been moved during the 12-month period unless the charges resulting from application of the rates in Item 291, BN Tariff 219-B, ICC 437, exceed the lowest charges that would have been collected if the tonnage requirements had been met. In this event the deficit in tonnage shall be billed at the annual volume rate and be collected by ATSF. (e) Certification of shipments moving at such rates shall be made by ATSF. DISABILITY RULE (f) If during any calendar day or days (See Notes 2 and 3) in any 12-month period stated in Paragraph (b) of this item shipments cannot be made under rate referring hereto by a consignor to a consignee due to an act of God, strikes or lockouts in the railroad

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
150	Application of Rates—Continued	industry or strikes or lockouts or mechanical breakdown or fire in the consignor's or consignee's plant or facilities (See Note 1), the calendar day or days during that 12-month period in which shipments due to such occurrences cannot be made shall be considered as a disability day or days and the minimum aggregate tonnage required of that consignee during that 12-month period shall be reduced by 1/365 for each such disability day. Any day in which two or more of such events occur shall be considered as one disability day. NOTE 1.—The consignor, consignee or participating carrier encountering disability days shall within 30 days of the date the disability occurred notify the carrier or inspection bureau, as the case may be, having jurisdiction over the volume movement of such disability and shall furnish a certificate stating: "This is to certify that on (month-day-year) the following disabilities occurred (here show type of disability as provided in Paragraph (f)) thereby resulting in authorized reduction in volume tonnage as specified in (here show specific paragraph, item number and ICC number of tariff)." NOTE 2.—If shipments are made by a consignor to a consignee under this item during any calendar day in which one or more of the events specified in this paragraph occur, that day with respect to shipments from the consignor to the consignee shall not be considered as a disability day. NOTE 3.—Saturdays, Sundays and legal holidays shall not be counted unless consignor's loading facilities or consignee's unloading facilities normally operate on those days. The term legal holidays embraces only the following: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. In the event one of the above holidays occurs on a Sunday, the following Monday will be considered as a holiday. Where provisions of State Laws vary, the day referred to as Memorial Day being obscure, the date of the day referred to in different states as "Memorial Day", "Decoration Day" or otherwise, and generally observed in lieu of May 30 will for the purpose of this item be treated as Memorial Day.

Rules 4(i) and 7 of Tariff Circular waived; ICC Permission No.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS LIMITED

Item	Subject	Application

(Applicable only when specific reference is made hereto)

Tariffs referring hereto are not subject to Ex Parte Increases but are subject to annual escalation determined by use of the following formula:

ESCALATION FORMULA

Effective July 1 rates are subject to escalation by an amount based 80 percent of the present rate multiplied by the change in the index for the two (2) preceding years. Thus the following formula will determine the amount of escalation to be applied for the annual period July 1, 1977 through June 30, 1978 (See Notes 1 and 2).

YEAR	INDEX
1975	215.0
1976	236.7

155 Escalation of Rates

(.8) x Present Rate (236.7 - 215.0)

$$(.8) \times \text{Present Rate} \left(\frac{236.7 - 215.0}{215.0}\right)$$

EXAMPLE

$$(.8) \times {}^{1}\,1000¢ \left(\frac{236.7 - 215.0}{215.0}\right)$$

800¢ x .10093 = 80.74 = 81¢

Amount of escalation: 81¢

Rate effective July 1, 1977: 1081¢

1 Rate in cents per net ton of 2,000 pounds

NOTE 1.—When shipments first commence, 100 percent of the rate will be escalated from the previous July 1 until month in which shipments commence, then 80 percent will be applied for remainder of the 12-month period until July 1 of the succeeding year.

For explanation of abbreviations, see concluding page of this tariff.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS LIMITED

Item	Subject	Application
155	Escalation of Rates—Continued	EXAMPLE Present Rate: 1000¢ per net ton of 2,000 pounds Date of first movement: March 1, 1977 1000¢ x .10093 x .667 = 67.32 800¢ x .10093 x .333 = 26.89 94.21 = 94¢ Amount of escalation: 94¢ Rate effective July 1, 1977: 1094¢ NOTE 2.—Fractions resulting from the application of the formula will be dropped if less than a half-cent and converted to the next higher whole cent if one-half cent or more. Any cost increases caused by new governmental regulations (except federal income taxes) will be added directly to the rates. BN will have the obligation of demonstrating to the shipper the effect of such cost increases.

RATES IN CENTS PER 2,000 POUNDS

Item	Commodity	From	To	Rate
200	COAL. Subject to Item 150. Route via BN-Denver, CO-CS-Sixela, NM-FWD-Ft. Worth, TX-ATSF.	Cordero.......... WY Jacobs Jct ...... WY	Smithers Lake ... TX	1560

EXPLANATION OF ABBREVIATIONS

ATSF	Atchison Topeka and Santa Fe Company, The.
BN	Burlington Northern Inc.
CS	Colorado and Southern Railway Company, The.
FWD	Fort Worth and Denver Railway Company.
ICC	Interstate Commerce Commission.
No	Number.
RER	Railway Equipment Register.

RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS UNLIMITED

Item	Subject	Application
110	Industries From Which Rates Named in Item 301 Apply.	Kerr-McGee Corporation, Jacobs Ranch Mine located in Campbell County, Wyoming.

RATES

Item	Commodity, carloads	Application FROM		Application TO		Rates in class per 2,000 pounds
301	COAL, BITUMINOUS. (See Notes 1 to 6).	(1) Cordero....	WY	Smithers Lake ...	TX	2488

NOTE 1.—Applicable only in open top cars having marked capacity of 196,000 pounds loaded to full visible capacity, subject to aggregate minimum of 105 cars per shipment tendered on one bill of lading, on one day, at one time, from one consignor at one location at one origin, to one consignee, at one location, at one destination.

NOTE 2.—Cars used for the transportation of coal hereunder must be furnished by consignor or consignee at no expense to the railroads parties to this tariff and no allowances, mileage payments or per diem will be paid on these cars to the consignor, consignee or owner thereof.

NOTE 3.—Rate includes the return movement of empty cars for movement from Smithers Lake, Texas to Cordero, Wyoming.

NOTE 4.—The carriers will not weigh shipments to obtain weights for assessment of freight changes. Weight ascertained at origin by consignor or at destination by consignee, subject to supervision and verification by the Western Weighing & Inspection Bureau shall be furnished by such parties to the SP for this purpose.

NOTE 5.—Consignor will at its expense perform the loading of the cars at loading point. The BN will move empty cars under the loading spouts at consignor's loading facilities at a controlled speed for fully and uniformly loading the cars. Consignee will at its expense perform the unloading of cars at consignee's unloading facilities at destination. The destination carrier will move loaded cars into consignee's unloading facilities at a controlled speed consistent with consignee's requirements.

NOTE 6.—Four hours free time will be allowed for loading of cars. Four hours free time will be allowed for unloading of cars. After the expiration of free time, the consignor at origin or consignee at destination, as the case may be, will be assessed a change of $250 per hour for each hour or fraction thereof for all cars in the shipment for delay of shipment in excess of the free time limit.

(1) Includes industries taking same rates as shown in Item 110.

Route via BN-Wendover, WY or Denver, CO-CS-Sixela, NM-FWD-Ft Worth-ATSF.

APPENDIX B

Analyses of cost evidence

I. PROTESTANT'S OPENING STATEMENT

Protestant has introduced a variable cost per ton of $8.61 and a cost per carload of $904.41 based on a lading weight of 210,000 pounds per car.

Basic Rail Form A[1] unit costs were developed for the calendar year 1976 and indexed[2] to reflect wages and price levels as of July 1, 1977, through use of AAR indices for fuel, material and supplies, and labor. These unit costs were developed separately for each carrier involved in the movement, i.e., Burlington Northern (BN), The Colorado & Southern Railway Company (C&S), Fort Worth and Denver Railway Company (FW&D), and Atchison, Topeka and Santa Fe (AT&SF). (It should be noted that both the C&S and FW&D are subsidiaries of the BN system.) Some basic Rail Form A system average unit costs have been replaced by actual costs where possible, and others have been adjusted to reflect the traffic and operating characteristics peculiar to the coal traffic at issue. Table I is a summary of traffic and operating characteristics used in developing cost for the proposed movement.

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[1] Rail Form A (ICC Statement No. 1F1-73, *Formula for Use in Determining Rail Freight Service Costs.*

[2] Ratio of 1.091.

TABLE 1

Summary of traffic and operating facts used in developing variable costs

Item	BN	C&S	FW&D	AT&SF	Total
1. Annual volume-tons	xxx	xxx	xxx	xxx	5,000,000
2. One-way mileage	506	349	453	299	1,607
Car characteristics					
3. Average load per car-tons	105	105	105	105	105
4. Tare weight per car-tons	26	26	26	26	26
Train characteristics					
5. Cars per train	110	110	110	110	110
6. Train sets	10	10	10	10	10
7. Trips per year per train set	45	45	45	45	45
8. Average diesel units per carrier	5.09	6.49	6.13	5.0	5.67
9. Round trip gross ton-miles	79,442	54,793	71,121	46,943	252,299
10. Yard switching time-hours	1.4	.38	.28	1.2	9.2
11. Switching minutes per car	0.75	2.05	1.54	0.67	5.01
12. Crews (round trip)	8	6	8	5	27

Rather than use basic Rail Form A system average unit costs exclusively, protestant computed the actual cost for the following items. The first, crew wages reflects basic daily and mileage rates of pay as of July 1, 1977, actual crew districts and mileage, weight of the SD-40 diesel-electric locomotives units used, number of persons comprising the crew on each railroad involved in the movement, general overheads and transportation departmental overhead ratios, and a constructive allowance ratio developed from each railroad's wage statistics. (No detail was shown of the development of crew wages from the above factors.)

The diesel-electric locomotive unit capital costs (return and depreciation) per carload for BN and AT&SF were increased to reflect each railroad's proportionate share of the purchase of 60 locomotive units plus spare parts equivalent to five units. Based on 1976/77 equipment trust certificates, a return on investment of 7.85 percent was used for both railroads. Based on their annual reports to the Commission, an annual depreciation rate of 3.92 percent was used for the BN and 4.30 percent for the AT&SF. Also, each carrier's diesel-electric unit miles and gross ton-miles were increased to reflect the additional annual coal movement.

The station clerical cost per carload was based on $1.25 per carload for billing unit coal train service in shipper furnished cars. This annual allowance of $60,000 for the 450 waybills equals $133 per shipment on one waybill.

The helper service cost per carload on the BN at Belle Ayr, Wyoming and Crawford, Nebraska was divided between the diesel-electric unit mile portion and the crew cost portion. The locomotive unit-mile portion was included in the expense "locomotive unit-mile cost per carload excluding locomotive capital costs" (exhibit LEP-4, page 1, line 3 of protestant's opening statement). The crew wage portion of this cost was based on wage rates as of July 1, 1977, increased for the appropriate overheads and allowances.

The caboose capital costs per carload were increased to reflect the purchase of eight cabooses by the BN, and three by the AT&SF, plus spare parts equivalent to one caboose. Based on 1976/77 equipment trust certificates a return on investment of 7.85 percent was used for both railroads. Based on their annual reports to the Commission, an annual depreciation rate of 3.11 percent was used for the BN and 3.23 percent for the AT&SF.

Other unit costs used in development of the cost of moving the unit train followed Rail Form A procedures. Briefly, these are as follows:

The expense portion of gross ton-mile costs, excluding locomotive capital costs for each railroad, was applied to the round trip gross ton-miles over each carrier to reflect that cost on a per carload basis. Round trip gross ton miles reflect the gross tons of cars and contents in the loaded direction, gross tare tons of cars in the empty direction, total train miles, and number of cars in the train consist. The cost per locomotive unit-mile excluding locomotive capital costs was multiplied by the round trip diesel-electric unit miles and divided by the cars in the train consist to reflect that cost on a per carload basis. The other train-mile unit cost, excluding caboose capital portion, was multiplied by the round trip train miles and divided by the number of cars in the train. These other train miles expenses reflect such items as dispatching trains, signals and interlockers, crossing protection, et cetera. Train supplies and expenses running per car were divided by the number of cars to develop the train supplies and expenses running cost per carload for the distance traversed over each involved railroad.

The car inspection cost per car-mile was multiplied by the round trip train miles to reflect the cost on a carload basis. The cost per revenue switch engine minute was multiplied by the switching minutes per carload to provide the cost per carload. The carload claims clerical cost per ton was multiplied by the average load per car to provide the cost on a per carload basis. Loss and damage cost per carload was based on evidence filed in docket No. 36180, *San Antonio, Tex.* v. *Burlington Northern, Inc., supra.*

The 13 cost elements were then totaled by railroad, and also in total, to yield the following cost per carload:

BN	$285.175
C&S	220.580
FW&D	235.310
AT&SF	163.345
Total	$904.41

Based on 105 tons per car, the cost is $8.61 per ton.

II. RESPONDENTS' REPLY STATEMENT

Respondent railroads have submitted a variable cost of $12.65 per ton. When compared with the $15.60 proposed rate per ton, the ratio of rate to cost is 123 percent. Also submitted are fully allocated costs of $19.83 based on the ton and ton-mile method and $16.96 based on the ratio (dollar) method.

Respondents state that the difference in their estimate of $12.65 and protestant's estimate of $8.61 lie in several areas, as follows:

(1) Differences with respect to traffic and operating characteristics;

(2) Differences with respect to capital cost, i.e., the proper rate of return to be used;

(3) Differences with respect to treatment of incremental investments required to handle this coal traffic—including locomotive and track structure; and

(4) Differences with respect to locomotive unit-mile expenses, train-mile, crew wages, and station clerical expenses.

More specifically, these major differences are as follows:

1. *Traffic and operating characteristics.*—The following table summarizes the differences between protestant's and respondents' viewpoints on traffic and operating characteristics.

TABLE 2

Differences in operating characteristics between protestant and respondents

Traffic		Protestant	Respondents
Annual volume	Tons	5,000,000	5,200,000
Round trip transit time	Hours	xxx	176
Motive power			
Locomotive consists:			
BN		5	5
C&S		7	7
FW&D			
Texaline to Amarillo		7	7
Amarillo to Ft. Worth		6	6
Santa Fe		5	6
Helper consist: Nebraska (26 miles)		3	3
Wyoming (20 miles)		1	1
Crew districts (loaded & empty)			
BN		8	8
C&S		6	6
FW&D		8	8
Santa Fe		6	8
Total		28	30
Yard engine switching			
BN	Hours	8.00	8.13
Santa Fe	do	1.20	1.78
Total	do	9.20	9.91
Road engine switching			
BN—Jacobs Ranch Mine, Wyo.	do	---	4.00
—On line	do	---	3.00
Santa Fe—Smithers Lake	do	---	3.25

Protestant used 65 locomotive units in developing costs based on an 8-percent spare margin. Respondents used 69 units based on a 15-percent spare margin. Respondents support their argument for a 15-percent spare margin by the division of active unit hours by the hours owned, as shown in exhibit JAD-1 of their reply statement.

Protestant asserted that only five locomotive units would be needed on the AT&SF. Exhibit JAD-2 to respondents' reply statement is a tonnage rating sheet for part of the AT&SF route. Respondents state that this sheet shows that 5.7 units will be required for the unit coal trains. Also, acceleration is 23 percent greater with six units than with five, thereby reducing delays to other trains caused by the unit coal train.

2. *Differences with respect to the rate of return.*—Respondents used an after tax rate of 11 percent reflects the cost of equity as well as debt capital and takes account of the effect of income taxes. Protestant used embedded debt rates of approximately 5.5 percent for the BN and 6.1 percent for the AT&SF which completely ignores the higher cost of equity capital and the effect of income taxes on the return on equity capital. Respondents argue that no one today believes that the overall cost of capital (debt and equity) to the railroads after provisions for income taxes is in the range of 5.5-6.1 percent. Respondents further maintain that protestant's approach is contrary to the 4R Act.

Respondents contend that the return portion of the variable cost of the unit coal train movement is $4.05 compared with protestant's $0.87 per ton, a difference of $3.18. For the return in fully allocated costs computed by the ratio (or dollar) method, respondents' $5.65 per ton exceeds protestant's estimated return of $1.22 by a margin of $4.43 per ton.

3. *Differences with respect to treatment of incremental investment required to provide service.*—Respondents state that they must purchase 69 diesel-electric locomotive units to handle the HL&P unit coal trains. Protestant concedes that 65 units and spares are being purchased and should be considered in developing costs for the proposed movement. As far as the cost of new investment in the track structure is concerned, respondents state they they have allocated only part of these costs to the HL&P. Other coal shippers would also pay their share of the cost of these new capital investments.

Respondents contend that protestant did not allocate the cost of the locomotives or improvements to the track structure to HL&P. Instead, respondents argue, protestant adjusted system average costs and then recomputed the costs of the movement using these system average costs. The effect of this approach was to assign "only a very small fraction" of the capital costs to HL&P traffic. The remainder of the capital costs would, in effect, be shifted to shippers which would not benefit from the improvements. Respondents argue that they have used the costing method which attributes these additional costs to the shippers which would benefit from the improvement. Respondents state that their approach is supported by the Commission's decision in docket No. 36180, ***San Antonio, Tex.*** v. ***Burlington Northern, Inc., supra.*** In the ***San Antonio*** case, the Commission treated the railroad's investment in upgrading and improviing the line as an incremental cost to be borne by the shippers, and it approved the allocation of a fair portion of those incremental costs to the San Antonio unit coal train.

4. *Other cost items.*—Protestant used system average locomotive unit-mile expenses. Respondents insist that the six-axle heavy duty locomotives used in unit coal trains are 11 percent heavier than the average system locomotive. Therefore, they are more expensive to operate because of higher maintenance, fuel, and other expenses. Consequently, respondents adjusted the system average Rail Form A unit-mile expense by increasing it by 11 percent. AT&SF repair records (exhibit JAD-3) show that repair expenses for six-axle locomotive units are 15.662 percent greater than system averages, so respondents contend the 11 percent actually used was conservative.

The difference between protestant and respondents, with respect to train-mile crew wages is $11.93 per car. Respondents contend that protestant used the wrong wage rate schedule. The wage schedule used by respondents reportedly sets forth the local agreements between labor and the involved railroads as of July 1, 1977.

The difference between protestant's and respondents' cost, with respect to station clerical expenses, is $12.45 per car. Protestant used an unsupported $1.25 per car. Respondents used the Ex Parte No. 270 (Sub No. 4), *Investigation of Railroad Freight Rate Structure—Coal* method which assigns 75 percent of the cost as being associated with the car and 25 percent as being associated with the shipment. Respondents add that these expenses include more than the simple preparation of the waybill. Included are items related to car handling and train movement such as preparation of wheel reports, bad order reports, timekeeping reports, crew calling, track checking, and car handling recordkeeping. Consequently, respondents consider protestant's $1.25 inadequate.

5. *Car ownership costs.*—Respondents acknowledge that the proposed rate applies only on shipper-owned cars. Currently, the capital and maintenance cost for an open-top, solid-bottom rotary coupler, high-rise gondola is $2.21 per ton. No use has been made of this cost by any of the parties. Apparently it was included for information only.

In addition to the above major points between protestant and respondents in computing the cost of the unit-train coal movement, the following items, having a minor effect on costs, have allegedly been corrected in respondents' own computation of costs.

To develop their variable cost of $12.65 per ton, respondents applied Rail Form A separately to the 1976 expenses and statistics of the BN, C&S, FW&D, and AT&SF. Costs were updated from the average year 1976 to July 1, 1977, through use of procedures outlined in ICC Statement No. 2-58, *Rail Carload Cost Scales by Territories as of Jan. 1, 1958*, and through use of the AAR *Indexes of Railway Material Prices and Wage Rates*, Series Q-MPW-95, the *Supplement to the Indexes of Railroad Material Prices and Wage Rates*, Series Q-MPW-94, and data pertinent to the BN and AT&SF. The index factors used were:

BN	1.0949
C&S	1.0815
FW&D	1.0923
AT&SF	1.0961

The use of shipper-owned freight cars required the elimination of all expenses related to car ownership from the gross ton-mile expense.

The Rail Form A locomotive unit-mile expense was adjusted by removal of the "locomotive investment terms." An additional adjustment of the system average cost was made to better reflect the differences in operating expense between six-axle locomotives and four-axle locomotives.

To permit separate treatment of the incremental investment in cabooses, all caboose investment expense was removed from the train-mile other portion of the gross ton-mile cost. This includes a reduction to account 329, Dismantling Retired Equipment. Further, the terminal portion of train supplies and expenses, and the special service expenses have also been omitted.

The allowance for loss and damage claim payments was based on the weighted average of the 1976 loss and damage expense rate per ton of coal originated and terminated by the BN and AT&SF.

Respondents' costs reflect 9.9 hours of yard switching time. This is composed of 1 hour at Alliance, Nebr., 3.5 hours at Denver, Colo, 2.5 hours at Amarillo, Tex., 1.4 hours at Temple, Tex., and 1.5 hours of bad order yard switching. The hours for Temple are caused by processing 500-mile inspection defects and moving the RCE slave locomotive units to the head end of the train on the return trip. Based on prior experience, the BN should expect 1.70 incidents per train and the AT&SF 0.57 incidents. Including the times for moving a bad ordered car to the rip track and placing the repaired car in a succeeding train, each bad ordered car averages 40 minutes of switching time. Multiplied by the anticipated bad order incidents per train, the result is 68.1 minutes per train on the BN and 22.7 minutes per train on the AT&SF, or 90.8 minutes total.

In lieu of using the Rail Form A road train to industry switching expenses, defendants have developed their own estimate of the added expense of loading and unloading the unit-coal train with railroad-owned locomotives. They have constructed an engine-minute unit cost which excludes all motive power investment and crew wages. Also, excluded were all "yard-specific expenses," and the road property and land investment allocated to train switching.

Shown below in table 3, is a summary of respondents' total variable and fully allocated cost for the issue traffic.

TABLE 3

Respondent railroads' costs for the unit coal train movement (cost per carload)

Item	Expenses	Road	Equipment	Total
BN—Origin terminal	$7.91	$.91	$.01	$8.83
BN—Line haul	244.94	54.21	1.94	301.09
C&S—Line haul	232.23	28.94	1.00	262.17
FW&D—Line haul	246.28	52.26	1.65	300.19
AT&SF—Line haul	163.39	30.79	1.44	195.62
AT&SF—Destination terminal	7.56	1.13	.02	8.71
Loss & damage expenses	.84	---	---	.84
Incremental capital investment—1977	---	53.87	179.87	233.74
Incremental capital investment—1976	---	16.80	---	16.80
Variable cost per carload	903.15	238.91	185.93	1,327.99
Variable cost per net ton	8.601	2.275	1.771	12.647
Ton and ton-mile basis:				
Fully allocated cost per carload	1,479.33	417.23	185.93	2,082.49
Fully allocated cost per net ton	14.089	3.974	1.771	19.833
Ratio or dollar basis				
Fully allocated cost per carload	1,187.76	407.15	185.93	1,780.84
Fully allocated cost per ton	11.312	3.878	1.771	16.960
Proposed rate per ton			$16.54	

BEST DOCUMENT AVAILABLE

III. PROTESTANT'S REBUTTAL OF RESPONDENTS' COST EVIDENCE

The difference between respondents' variable cost of $12.647 per ton and protestant's variable cost of $8.612 per ton is $4.04. Of the $4.04 difference, $0.86 is caused by differences in viewpoints between the parties with respect to operating characteristics and the related treatment of Rail Form A unit costs. The remaining $3.18 difference is caused by two additives used by respondents. One additive incorporates into variable costs a profit-orented rate of return on common equity. The other establishes the investment in locomotives and roadway through an incremental theory. Protestant maintains that both additives are contrary to accepted costing procedures.

Protestant argues that railroads are continually retiring and adding road freight locomotive units. To support its position protestant made a field study which indicated that the railroads do not purchase locomotives and assion them to a specific sevice. Protestant's study results also show that respondents' locomotive units are not assigned exclusively to unit-coal train services. The study showed that locomotive units utilized on the San Antonio unit-coal train averaged 4 years of age. They were not purchased new and assigned exclusively to the San Antonio train as respondents maintained in docket No. 36180, *supra*. Instead, protestant maintains, new locomotive units are placed into pools which service all traffic

Protestant maintains that none of respondents' many witnesses directly discuss the subject of capital investment in the track structure as required by the subject unit coal train. Respondents' witnesses have made investment projections by line segment of the improvements which they claim will be needed as a result of new coal traffic added after 1975. Protestant objects to the distinction between "old" and "new" coal traffic. Protestant further argues that the improvements, many of which have already taken place, benefit all traffic moving over the main line.

Exhibit LEP-8 of protestant's rebuttal statement consists of 24-pages showing the differences between respondents and protestant, in traffic and operating factors, development of line-haul variable costs, development of terminal variable costs, development of capital costs, and total variable costs.

There is no difference between respondents and protestant in the tare weight, average load per car, cars per train, round trip train-miles, or round trip gross ton-miles used in computing costs, nor in the loss and damage cost per carload, and the helper service cost per carload. Differences exist in all other items. Most of these differences have already been set forth in the sections containing the parties initial presentations and will be discussed under our comments.

IV. OUR EVALUATION OF THE COST EVIDENCE PRESENTED

Both protestant and respondent railroads used applications of Rail Form A to the 1976 expenses and statistics of the BN, C&S, FW&D, and AT&SF as the basis for their cost studies. The Rail Form A data were adjusted to reflect various operating characteristics of the subject traffic. Different points of view on these operating characteristics and differences in the allowance for the cost of capital and in incremental investment account for the differences in variable costs. The points of agreement and disagreement are evaluated below:

(1-4) No differences between protestant and respondents exist in determining the tare weight of the freight cars, the average load per car, the number of cars per train, and the round trip train-miles.

(5) Differences do exist in the round trip diesel-unit miles. Respondents include six diesel-electric locomotive units between Fort Worth and the plant, whereas protestant includes only five units on the AT&SF. Also, protestant aruges that the railroads in applying costs used seven locomotive units for the round trip movement over the C&S and FW&D instead of seven units in the loaded direction and six units in the empty direction. Consequently, costs were applied to 11,228 unit-miles rather than 10,085 for this segment, resulting in an inflated cost of $11.73 per carload.

Comments:

After inspection of exhibit JAD-2 of respondents' reply (an estimate of tonnage ratings), we believe that six units will be needed between Fort Worth and the plant in order to maintain proper speed and avoid delaying other trains. On the other hand, we believe that costs for only six units should be included for the empty movement over the C&S and FW&D from Fort Worth to Denver. Respondents' costs must be consistent with their statements of facts in the proceeding, i.e., only six units are needed for the movement over this segment of the trip.

(6) There are no differences between respondents and protestant in the computation of round trip gross ton-miles.

(7) Respondents included 9.9 hours of yard switch engine time whereas protestant included only 9.2 hours. The difference of an additional 0.1 hour on the FW&D and an additional 0.6 hour on the AT&SF is caused by differences of opinion over the number of locomotive units used on the AT&SF and the amount of time required to switch any bad order cars.

Comments:

We believe that respondents' 9.9 hours of yard engine switching time is a better estimate of the switching of the proposed unit coal train. Part of the difference in switching time is caused by differences of opinion over the number of locomotive units that will be used on the AT&SF. We believe that the AT&SF is correct in stating that six units are necessary to maintain adequate speed and to avoid delays to other trains. Consequently, the AT&SF's estimate of the time to switch these units is proper. The remainder of the difference is caused by estimated bad order switching time. Again we believe the railroads are correct based upon the aforementioned calculations presented on this subject. Protestant's reduced time is based on Commission recognition of time spent by car inspectors at destination plants. Such time has not been shown to be applicable to the unit coal train movement at issue.

(8) Respondents include 10.5 hours of road engine switching time while protestant includes nothing. Protestant states that its "variable costs include all variable operating expenses incurred by the railroads for moving this coal, including the time and mileage during loading and unloading the unit trains."

Comments:

Respondents' inclusion of the switching time by road locomotives is acceptable as will be discussed under item 16, herein.

(9) Respondents' $666.12 for the gross ton-mile cost per carload was based on their 1976 unit costs updated to July 1977. These unit costs include before tax embedded cost of capital rates of 19.31 percent for the BN, 19.28 percent for the C&S, 19.27

percent for the FW&D. and 19.56 percent for the AT&SF. These equate to an after tax rate of 11 percent. The return on road property and return on equipment costs for each railroad were increased by the following ratios to reflect the aforementioned embedded cost of capital rates BN—3.53, C&S—3.84, FW&D—3.43, and AT&SF—3.19. Respondents excluded net rents, nonrevenue freight car depreciation and nonrevenue freight car retirements. The unit costs were multiplied by the round trip gross ton-miles per car. Protestant's $545.18 for the gross ton-mile cost per carload was developed by applying the individual railroad's 1976 Rail Form A unit costs updated to July 1977 to the round trip gross ton-miles. Locomotive net rents and nonrevenue freight car expenses and return were excluded.

Comments:

Respondents use of a 11 percent after tax rate of return on the original cost basis is not acceptable for cost purposes. In recent years, the Commission has recognized only original costs less depreciation, i.e., net investment, as the method of determining the rate base. In accordance with its decision in docket No. 34013, ***Rules to Govern the Assembling & Presenting of Cost Evidence***, 337 I.C.C. 298, 393, the actual interest rate the railroads are paying on their existing debt is the proper rate to be applied to debt plus equity capital in determining variable costs. Accordingly, our restatement of the estimated cost reflects an allowance for cost of capital on the net investment basis utilizing the various embedded debt rates submitted by protestant. While respondents' use of the 11 percent after tax rate is not acceptable ***from a cost standpoint***, such a rate may be allowable based on the Commission's decision in docket No. 34013, ***supra***, in determining a revenue need level or allowance for profit.

(10) Respondents' cost of $194.20 for the locomotive unit-mile cost per carload includes the same rates of return on embedded capital as did their gross ton-mile cost per carload. Protestant's $120.92 cost was based solely on Rail Form A procedures. Both parties excluded locomotive cost of capital and depreciation which are applied separately on a direct basis. Protestant also objects to the railroads' method of computing the diesel-electric unit-mile cost, which it contends inflates the cost by $56.28 per carload. Other objections were directed at respondents inclusion of costs for excess number of locomotive units resulting in an additional overstatement totaling $16.82.

Comments:

Protestant's calculation of the locomotive unit-mile cost per carload more nearly portrays this item although it is understated by $5.09 per carload. Respondents' return on the embedded cost of capital is the same as for their gross ton-mile cost per carload and is rejected from a cost standpoint, as explained in item 9, herein. Respondents' adjustment to reflect the differences in operating expenses between six-axle locomotives and four-axle locomotives is unacceptable. We agree with respondents' assumption that the weight differential between four-axle and six-axle locomotives would result in a higher cost using the latter. However, we do not believe respondents have adequately supported an increased cost in the magnitude of $56.28 per carload. Protestant also objects to respondents' inadvertent use of seven locomotive units in both directions on the C&S and FW&D. We concur in this objection since respondents stated that only six locomotives were needed but then used seven in developing their cost. We cannot concur in protestants' objection to the railroads' inclusion of a sixth locomotive unit at a cost of $5.09 per carload between Fort Worth and the plant. Respondent has adequately demonstrated the need for this additional unit.

(11) Respondents' crew cost per carload of $134.37 does not differ significantly from protestant's $122.44. Protestant makes several general criticisms of respondents' computation of crew wages.

Comments:

The record does not show in a clear and concise manner the step-by-step computations of crew wages by either party. Further, we do not believe that protestant has adequately explained or supported its criticisms. Therefore, since it would appear that the railroads should be aware of what its requirements and limitations are, and to insure that our restated costs are not understated, we have used respondents' cost in our restatement.

(12) Respondents include $28.04 for the train-mile (other) cost per carload while protestant includes $27.64. Respondents' cost was based on the railroads' 1976 unit costs updated to July 1977 with before tax rates of return on embedded capital of 19.31 percent for the BN, 19.28 percent for the C&S, 19.27 percent for the FW&D, and 19.56 for the AT&SF. The caboose cost of capital and depreciation were excluded and computed separately. The unit costs were multiplied by the round trip train miles and divided by the cars per train. Protestant's cost were computed in the same manner except that protestant followed the Rail Form A procedures.

Comments:

Protestant cost is used in our restated cost. Respondents' approach is unacceptable from a cost standpoint, as previously explained in our discussion of the cost per gross ton-mile, item 9, herein.

(13) Respondents' car inspection cost per carload of $16.90 is almost identical to protestant's $16.91.

(14) Respondents' cost for train supplies and expenses—running per carload of $18.60 is very close to protestant's $18.58.

(15) Respondents' switching cost per carload of $7.55 differs from protestant's $6.19. Respondents cost was based on 1976 costs indexed to July 1977 with the previously noted before tax rates of return on embedded capital and increased for 5.40 nonrevenue minutes. Protestant's cost was also based on 1976 costs indexed to July 1977, but was computed without the additional return and with only 5.01 nonrevenue minutes per carload.

Comments:

As discussed under item 7, we have accepted respondents' switching time. However, for reasons given under our discussion of the cost per gross ton-mile, item 9 herein, we reject respondents' cost per switch engine minute. Our restatement is based on respondents' estimates of the minutes multiplied by protestant's cost per switch engine minute.

(16) Respondents have included $2.45 for their road engine switching cost per carload. The railroads adjusted the Rail Form A cost per switch engine minute and applied the results to the 10.5 hours for switching the train at the mine, on line and at the plant. Protestant included no cost for switching by road locomotives contending that since the round trip train-miles, diesel unit-miles and gross ton-miles include the complete movement from origin to destination and return, respondents adjustment amounts to a double count of the variable costs.

Comments:

As respondents state, neither protestant's gross ton-mile expense factor no their own modified gross ton-mile factor reflect the switching performed by road crews at either origin or destination. Consequently, the railroads' inclusion of this cost is acceptable. Protestant has made no statement as to the manner in which the inclusion of this cost item results in a double count. It is our opinion that none of the cost attributes included by protestants reflect switching by road crews. Consequently, respondents' cost of $2.45 per carload is acceptable.

(17) Respondents' carload claims clerical cost per carload of $2.14 exceeds protestant's $1.92 because of respondents' inclusion of the return on embedded capital of 19.31 percent for the BN and 19.56 percent for the AT&SF. Protestant follows the Rail Form A procedures.

Comments:

Protestant's calculations are preferable to respondents for reasons previously stated under item 9, herein.

(18) Respondents' $13.70 station clerical cost per carload greatly exceeds protestant's $1.25. Respondents' cost is based on the 1976 unit cost indexed to July 1977 with before tax rate of returns on embedded capital of 19.31 percent for the BN and 19.56 percent for the AT&SF. Respondents used the Ex Parte No. 270 (Sub-No. 4), *supra*, method in assigning 75 percent of the cost as being associated with the car and 25 percent as being associated with the shipment. The 25 percent was divided by 110 cars and the quotient added back to the 75 percent. Protestant maintains that its $1.25 per car, which is over $652,000 annually, more than compensates the railroads for the costs incurred.

Comments:

Respondents' methodology is more acceptable. As the railroads point out, billing is only a small portion of the station clerical cost. Our own internal studies indicate that 25 percent of the station clerical cost is associated with the shipment and only that part of the station clerical cost varies with the number of cars transported on one bill of lading. Protestant's $1.25 is little more than a rough estimate. We find respondents cost to be the better estimate except that it includes an excessive return on investment as explained in item 9, herein. We have therefore attempted to restate respondents' return portion of this item to reflect the approximate actual embedded debt rates.

(19) Both respondents and protestant agree on $0.84 for the allowance for loss and damage claim payments per carload.

(20) Respondent's $0.87 cost per carload for helper service at Belle Ayr, Wyo., and Crawford, Nebr., was accepted and used by protestant. Thus, there is no dispute regarding this item.

(21-24) Respondents and protestant differ greatly in their handling of the added capital costs included in the variable cost of moving the unit coal train. Capital costs included by the parties were:

	Respondent	Protestant
Locomotive diesel unit capital cost (return and depreciation) per carload	$177.55	$41.31
Cabhose capital cost (return and depreciation) per carload	2.31	0.36
Fixed plant investment—1977 per carload	53.86	0
Fixed plant investment—1976 per carload	16.80	0

(a) ***Locomotive diesel unit cost per carload.***—To support its locomotive diesel unit capital cost (return and depreciation) per carload of $171.55, respondents argue that the BN must purchase 53 diesel-electric locomotive units and the AT&SF 16 locomotive units. System average motive power availability for six-axle locomotives is approximately 85 to 87 percent, excluding units stored either servicable or unservicable. Some provision must be made for locomotives while units are out of service for maintenance and Federal inspection. Protestant argues that the BN will purchase only 50 units and the AT&SF 15 units. We believe that since the locomotives will be placed in the general pool of motive power, and available units, new or old, used for the HL&P unit coal train, as protestant argues, that protestant's determination of motive power needs is the better estimate.

Respondents used an 11 percent after-tax capital cost to develop the annual capital cost of equipment in conjunction with a 15-year service life and zero percent net salvage value. To determine the unit capital cost respondents used annuity rates of 0.208 for the BN and 0.210 for the AT&SF to recognize both capital recovery (depreciation) and the cost of capital. The 11 percent after-tax capital cost converts to a before-tax rate of 19.31 percent for the BN and 19.56 percent for the AT&SF.

Protestant computed its return at 7.85 percent based on the average for equipment trust certificates from respondents' underlying workpapers. Annual depreciation of 3.92 percent for the BN and 4.30 percent for the AT&SF was based on each railroad's 1976 Annual Report to the Commission. Incremental locomotive return monies related to the subject movement were added to each railroad's total annual locomotive return monies. In the same fashion the incremental diesel unit-miles and gross ton-miles were added to 1976 system totals. The resulting increased gross ton-mile and diesel unit-mile unit costs indexed to July 1977 were then separately multiplied by the round trip gross ton-miles and round trip diesel unit-miles and divided by the cars per train. The result was protestant's locomotive diesel unit cost (return and depreciation) of $41.31 per carload.

The following excerpt is taken from docket No. 34013, *supra*, "Allowances for return on investment *** to the extent that they are admittedly intended to serve as an encouragement and incentive for continued or risk bearing ownership, are in the nature of so-called pure economic profits and should not be taken into account as an element falling within the restrictive construction given here to costs. This is not to say, however, that such an allowance for profit is not to be considered as a factor in ratemaking ***. However, this so-called pure profit should be clearly distinguished from opportunity costs. The latter does include a return on investment, simple, in the sense of, and as the equivalent to, cost of capital, but in no way connected with the risk or incentive of ownership. It is with respect to this limited effect to be given to return on investment as an element of cost that the examiner generally agrees with the explanation of the Cost Finding Section as to why equity capital invested in carriers' facilities should be treated in the same manner as similar debt."

Therefore, we accept protestant's cost of $41.31 since we believe the 7.85 percent is more indicative of the "current" embedded debt rate. Again, based on docket No. 34013, *supra*, a higher rate may be allowable, not from a cost standpoint, but from an allowance for profit standpoint.

(b) *Caboose capital cost per carload.*—Both respondents and protestant based their caboose capital cost per carload on the purchase of 11 new cabooses. However, respondents developed a capital cost of $2.31 per carload whereas protestant developed a capital cost of only $0.36 per carload.

Respondents amortized the $51,000 cost of each caboose assuming a 15-year service life and an annuity rate of 0.208 for the BN and 0.210 for the AT&SF. The annuity factor was based on an 11 percent after-tax cost of capital, and statutory tax rates.

Protestant used the same 7.85 percent return as for locomotive diesel unit capital cost development. Annual depreciation of 3.11 percent for the BN and 3.23 percent for the AT&SF was based on each railroad's Annual Report to the Commission. Based on these assumptions, protestant added the incremental annual caboose depreciation and return monies to the monies included in their Rail Form A's. The resulting units costs were divided by each carrier's Rail Form A system train miles. After updating the resultant unit costs to July 1977, these unit costs were applied to the round trip train miles for the movement. These computations provided protestant's caboose capital cost per carload of $0.36.

We accept protestant's cost of $0.36 based on the 7.85 percent return as being the proper rate for establishing the variable cost. Our reason for this action is the same as our reason for accepting protestant's locomotive diesel unit cost (return and depreciation) cost per carload.

(c) *Fixed plant investment—1976 and 1977.*—Respondents include $16.80 per carload for their fixed plant investment in 1976 and $53.86 per carload for their fixed plant investment in 1977. Protestant included nothing for fixed plant investment.

Respondents argue that the weight of the cars and length of the unit coal trains place considerable stress on the track structure thereby lessening its life. These incremental costs are assigned exclusively to *all* unit coal trains under the belief that shippers not benefiting from them should not have to pay for the improvements. They are assigned to all such coal traffic, not merely HL&P coal trains. Protestant argues that none of respondents' witnesses directly discuss the subject of capital investment in the track structure as required by the HL&P unit coal trains. Protestant contends that respondent distinguishes between "old" and "new" coal traffic and assigns costs for these improvements only to traffic gained since 1975. Protestant further maintains that all traffic moving over the lines will benefit from the improvements.

In the *San Antonio* case, docket No. 36180, *supra*, the Commission included as cost, the expense for plant expansion allocated to the issue traffic. Since the Commission accepted this amount, therein, even though it covered more than the cost falling within the restrictive construction given to costs in docket No. 34013, *supra*, we will accept respondents' $53.86 and $16.80 in this proceeding also.

Table 4 is a summation of respondent railroads' itemized costs, protestant's itemized costs, and our restatement. Most lines contain the itemized cost at the right of the column with the expense portion above the return portion at the left.

TABLE 4

Comparison of respondents', protestant's and our restated costs for the unit coal train movement (expense, return and variable cost itemized per carload)

	Respondents		Protestant		Our restatement	
Line-haul variable costs						
Gross ton-mile	$496.56		$496.40		$496.40	
	169.56	$666.12	48.78	$545.18	48.78	$545.18
Locomotive unit-mile	192.86		120.65		125.74	
	1.34	194.20	.27	120.92	.27	126.01
Crew		134.37		122.44		134.37
Train-mile (other)	27.69		27.54		27.54	
	.35	28.04	.10	27.64	.10	27.64
Car inspection		16.90		16.91		16.91
Train supplies and expenses		18.60		18.58		18.58
Switching—yard	6.59		5.95		6.57	
	.96	7.55	.24	6.19	.24	6.81
Road engine switching	2.33			0	2.33	
	.12	2.45		0	.12	2.45
Terminal variable costs						
Carload claims clerical	1.84		1.83		1.83	
	.30	2.14	.09	1.92	0	1.92
Station clerical	12.02		1.25		12.02	
	1.68	13.70	0	.125	.70	12.72
Loss and damage		.84		.84		.84
Helper service		.87		.87		.87
Capital costs						
Locomotive diesel unit		177.55	29.46		29.46	
			11.85	41.31	11.85	41.31
Caboose		2.31	.26		.26	
			.10	.36	.10	.36
Fixed plant investment—1977		53.86		0		53.86
Fixed plant investment—1976		16.80		0		16.80
Total variable cost per carload		1,336.30		904.41		1,006.63
Total variable cost per ton		12.73		8.61		9.59
Fully allocated cost per ton on ratio method[1]		[2]16.96				12.86

[1] Variable cost assumed to be 74.57 percent of fully allocated costs based on exhibit JAD-7 of respondents' reply statement.

[2] Based on respondent's original variable cost of $12.647.

V SUMMARY

Our restatement produces a total variable cost of $9.59 per ton. Based on this variable cost, we have computed a fully allocated cost of $12.86 per ton using the ratio or dollar method.

APPENDIX C

Western unit coal train movements[1]

Origin (1)	Destination (2)	Tariff RR (3)	Reference ICC No. (4)	Annual volume (5)	Route (6)	Minimum tons per train (7)	Miles (8)	Rate[2] per ton (9)	Mills per ton mile (10)	Car ownership (11)
Protestant										
1. Belle Ayr, Wyo	Pueblo, Colo	BN	178	1,670,000	BN-CS	10,500	595	4.55	7.65	Shipper
2. Do	PL. Gibson, Okla	BN	380	2,700,000	BN-MP	10,000	1,142	8.34	7.30	Do.
3. Do	Amarillo, Tex	BN	304	750,000	BN-CS-FWD	10,335	942	7.49	7.95	Do.
4. Do	Welsh, Tex	BN	419	1,650,000	BN-KCS-LA	10,290	1,474	10.65	7.23	Do.
5. Cordero, Wyo	Elmendorf, Tex	BN	411	2,700,000	BN-CS-FWD-SP	10,808	1,644	11.37	6.92	Do.
6. Belle Ayr, Wyo	Jeffrey, Kans	BN	461	2,000,000	BN-CP	10,600	764	5.58	7.93	Do.
Average				1,911,666		10,422	1,084	8.00	7.50	
Respondent										
1. Belle Ayr, Wyo	Amsterdam, Mo	BN 259	416	1,600,000	BN-KCS	10,500	873	[3]8.53	9.8	Shipper
2. Gallup, Minn	Joseph City, Ariz	ATSF 9373-N	15347	1,200,000			117	3.33	28.46	
3. Do	Trona, Calif	ATSF 15661	15360	375,000			749	11.77	15.71	
4. Do	Joseph City, Ariz	ATSF 9373-N	15347	800,000			117	3.74	31.97	
5. Converse, Colo	Gary, Ind	DRGW 7576	1264	600,000			1,465	[3]16.88	10.66	
Proposed										
Cordero, Wyo	Smithers Lake, Tex			5,200,000	BN-SF	10,500	1,607	[4]15.60 16.54	9.7 10.3	Shipper

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[1] Data presented is based on evidence presented by the parties.

[2] Rates submitted by protestant are current as of July 15, 1977.

[3] Effective October 1977.

[4] Respondents alternative proposed rate.

APPENDIX D

Respondent's additional maintenance-of-way cost

The additional maintenance-of-way expenses, over and above the system Rail Form A formula expenses, due to long heavy coal unit-trains are estimated by respondents to be $110 per million gross ton-miles. These added expenses have been developed for the route of HL&P coal unit-train, based on the projected 1979 coal tonnages.

The HL&P coal movement will generate 9,160,000 gross tons per mile to deliver 5,200,000 net tons. The additional maintenance-of-way per unit is then:

9.36 million gross-tons x $110/mgt. = $1,029.60

For each of the BN-family lines

BN: $1,029.60 x 505.5 miles = $520,462.80

$$\frac{\$520{,}462.80}{5{,}200{,}000} = \$0.10 \text{ per net ton}$$

C&S: $1,029.60 x 348.7 miles = $359,021.52

$$\frac{\$359{,}021.52}{5{,}200{,}000} = \$0.07 \text{ per net ton}$$

FWD: $1,029.60 x 452.9 miles = $466,305.84

$$\frac{\$466{,}305.84}{5{,}200{,}000} = \$0.09 \text{ per net ton}$$

EQUIPMENT INVESTMENT

HL&P coal unit-train (1977 investment only)

Burlington Northern, Inc.					
(BN, C&S and FW&D)	(77.2% Pro rata Share)[1]				
Locomotives	69 x 0.772	=	53 units		
(15% Contingency)					
	$603,700 per unit x 53 units			=	$31,996,100
Waycars	11 x 0.772	=	8 units		
(10% Contingency)					
	$51,000 per w/c x 8			=	408,000
Total BN Family					$32,404,100
Annuity Rate	0.207719				
Annual Requirement	0.20779 x $32,404,100			=	$6,730,936.92
Annual Volume					5,200,000
Cost Per Ton	$6,730,936.92/5,200,000			=	1.294/Ton

[1] See footnote at end of table.

EQUIPMENT INVESTMENT--Continued

HL&P coal unit-train (1977 investment only)--Continued

Santa Fe	(22.8% Pro rata Share)[1]			
Locomotives (15% Contingency)	69 x .228	= 16		
		$639,000 per unit x 16 units	=	$10,224,000
Waycars (10% Contingency)	11 x .228	= 3		
		$51,000 per unit x 3	=	153,000
Total ATSF				10,377,000
Annuity Rate	0.210002			
Annual Requirement		0.210002 x $10,377,000	=	$2,179,195.20
Annual Volume				5,200,000
Cost Per Ton		$2,179,195.20/5,200,000	=	$0.419
Composite Totals				
Cost Per Ton				
BN, C&S and FWD		$1.294		
Santa Fe		0.419		
Total		1.713		

See footnote at end of table.

EQUIPMENT INVESTMENT--Continued

HL&P coal unit-train (1977 investment only)--Continued

Composite Totals--Continued	
Cost Per Carload	
BN, C&S and FWD	
$1.294 x 105 tons/car	$135.913
Santa Fe	
$0.419 x 105 tons/car	43.995
	$179.908

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[1] Pro rata shares based on schedule hours

BN, C&S and FWD

135.75 ÷ 175.75 = 0.772

Santa Fe

40 ÷ 175.75 = 0.228

Fixed plant investment HL&P coal train (1977 investments only)

Burlington Northern, Inc. (C&S and FWD)	Total I.O.E.	Total A&B	HL&P pro rata share		HL&P I.O.E.	HL&P A&B	HL&P Total
			I.O.E.	A&B			
Roadway							
BN	$7,020,100	$34,102,785	0.1892	0.1721	$1,328,152	$5,869,441	$7,197,593
C&S	4,675,200	3,599,700	0.4210	0.4210	1,968,259	1,515,474	3,483,733
FWD	4,200,800	3,035,200	0.4419	0.4542	1,856,182	1,378,548	3,234,730
Total	15,896,100	40,737,685	0.3241	0.2151	5,152,593	8,763,463	13,916,056
Net present value of accelerated I.O.E.					$3,856,865		
Annuity rates					0.125576	0.198830	
Annual requirement					$484,330	$1,740,451	$2,224,781
Annual volume (tons)							5,200,000
Cost per ton							$0.427
Structures							
Alliance diesel shop	----------------	$8,522,900	0.15497	0.15497	----------------	$1,320,800	$1,320,800
Annuity rates					0.125576	0.195835	
Annual requirements					----------------	$258,658	$258,658
Annual volume							5,200,000
Cost per ton							$.050
Total Burlington Northern, Inc							

Fixed plant investment HL&P coal unit-train (1977 investments only)—Continued

Burlington Northern, Inc. (C&P and FWD)	Total I.O.E.	Total A&B	HL&P pro rate share		HL&P I.O.E.	HL&P A&B	HL&P Total
			I.O.E.	A&B			
Santa Fe							
Roadway TCS on siding at Thompson	$126,900	$358,100	0.9455	0.9455			
East leg of Wye Track	15,800	537,500	0.9455	0.9455			
Rehabilitate 11,966 TF	-Compl-	-Compl-	------------	------------			
Total	$141,700	$895,600	0.9455	0.9455	$133,977	$846,790	$980,766
Annuity rates					0.125576	0.201250	
Annual requirement					$16,824	$170,416	$187,240
Annual volume (tons)							5,200,000
Cost per ton							$.036
Total cost per ton							$.513
Total cost per car (105 tons per car)							$53.86

No. 36664

TEMPORARY GRAIN DOORS, SOUTHERN RAILWAY SYSTEM

Decided February 17, 1978

Proposed cancellation of tariff provisions authorizing furnishing of grain doors at certain points in Southern Freight Association (SFA) territory found to violate sections 1(4) and 1(6) of the Interstate Commerce Act. Schedules ordered canceled, and proceeding discontinued.

James L. Howe III for respondent.
J. C. Harper and *Timonthy P. Mehl* for protestants.

REPORT AND ORDER OF THE COMMISSION DIVISION 2
COMMISSIONERS STAFFORD, MURPHY, AND CLAPP

BY THE DIVISION:

The modified procedure was followed. Due and timely execution of our functions under section 15(8) of the Interstate Commerce Act imperatively and unavoidably requires the omission of an initial decision in this proceeding. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective August 25, 1977, the Southern Railway System (Southern or respondent), proposed cancellation of certain tariff items providing for free grain doors on boxcar shipments of various bulk commodities including cottonseed and other vegetable meals, at Huntsville and Selma, Ala., and Augusta and Macon, Ga., and certain other points in SFA territory. Upon protests of Seaboard Allied Milling Corporation (Seaboard), and National Cottonseed Products Association, Inc. (National), the proposal was not suspended, but an investigation of the schedules was instituted by an order of the Commission, division 2, Acting as an Appellate division, entered August 24, 1977.

The proposed cancellation of the six items is published in supplement 23 of Southern's tariff ICC A-11748, items 760-C, 839-A, 860-C, 900-C, 1085-A, and 1390-C. The pertinent provisions of these tariff items are shown below:

1. Item 760-B, Sup. 20 (not applicable on intra-terminal, inter-terminal nor switch movements). When necessary to protect CL bulk shipments at stations named in items 860, 900 and 1390, and by the carriers shown, temporary inside door boards will be furnished, but not installed, without charge, and no charge will be made for transporting such doors, i.e., they will be considered part of the car and their weight will not be used in making up the CL minimum weight.
2. Item 839, Sup. 22, covers the provision of grain doors for boxcar shipments of peanut, soybean or cotton seed oil cake or meal at Selma, Ala., Augusta and Macon, Ga.
3. Item 860-B, Sup. 20, concerns grain doors for boxcar shipments of grain at Boyce, Tenn.
4. Item 900-B, Sup. 20, provides for grain doors for boxcar shipments of animal or poultry feed, soybean meal, corn oil meal or hominy feed.
5. Item 1085, Sup. 15, applies on grain doors for boxcar shipments of cottonseed oil cake or meal from Huntsville, Ala.
6. Item 1390-B, Sup. 20, concerns the provision of grain doors for boxcar shipments of animal or poultry feed from all Southern stations except Boyce and Chattanooga, Tenn.

The respondent contends that a grain door is merely a supplemental barrier installed in a boxcar to facilitate the loading and control therein of a bulk commodity, and as such is just another form of dunnage. In this respect it relies on rule 30 of Uniform Freight Classification No. 12, ICC 8, which reads in part as follows:

> NOTE 1.—The term "dunnage" does not include excelsior, hay, sawdust, shavings, shredded paper, straw packing cushions or pads or similar packing material.
>
> SECTION 1.—(a) Except as otherwise provided in tariffs of carrier at point of origin or transit station, as the case may be, temporary blocking, flooring or lining, corrugated fibreboard or plywood separators or dividers, standards, strips, stakes, or similar bracing or supports (hereinafter referred to as dunnage) not constituting a part of car, when required to protect and make CL freight secure for shipment must be furnished and installed by shipper and at his expense.
>
> (b) Except as otherwise provided in tariffs of carrier at point of origin or transit station, as the case may be, bulkheads, partitions, *temporary doors* or *door protection*, when required to protect or make CL freight secure for shipment, must be furnished and installed by shipper and at his expense. [Emphasis added by respondent.]

Southern argues that the considered grain doors are temporary doors as described in subsection 1(b) of note 1, above, and thus they must be furnished and installed by the shipper at the shipper's expense.

The Southern introduced an exhibit showing the extent to which grain doors were actually used on carload shipments of traffic included in the same commodity group which embraces cottonseed meal and wheat middlings. The exhibit includes all carload shipments originating on respondent's lines during 1976, and shows the percentage of carloads on which the Southern provided the grain doors, as shown in the table below:

TABLE 1

Commodity	Total number of cars	Cars where grain doors furnished	Percentage using grain doors
Feed (including wheat middlings)	20,153	3,154	15.7
Cottonseed cake or meal or by-products	906	48	5.3
Soybean cake or meal or byproducts	13,219	63	0.5
Grain	47,124	-----	---
Corn oil meal	241	-----	---
Peanut oil meal	1,013	-----	---
Total	82,656	3,265	4.0

Respondent introduced a cost study based on rail Form A, and computed for the actual lading and distance transported by general service boxcars from and to typical points. The per-ton expenses have been adjusted to provide for 24-hour loading of cottonseed and soybean meal, and 24-hour loading and unloading of wheat middlings. The cost study shows the ratios of per-ton revenues to both variable and fully allocated costs, including and also excluding the expense of providing the grain doors. In the table below we have shown the per-ton revenues and the variable costs per ton on shipments of wheat middlings from and to typical points, both excluding and including grain-door expenses:

TABLE 2

Origin	Destination	Miles	Revenue per-ton	Per ton variable costs: Excluding grain doors	Per ton variable costs: Including grain doors
Cleveland, Tenn	Statemill, N.C	323	$10.04	$6.24	$7.07
Chattanooga, Tenn	Gainesville, Ga	199	6.58	4.73	5.55
Boyce, Tenn	Montgomery, Ala	447	7.59	7.69	8.53
Culpeper, Va	Farmville, N.C	367	7.46	6.72	7.55
Chattanooga, Tenn	Jackson, Miss	309	6.36	5.11	5.91
Culpeper, Va	Baltimore, Md	61	5.28	2.38	3.20
Culpeper, Va	Statesville, N.C	291	8.04	5.83	6.65
Knoxville, Tenn	East Point, Ga	195	7.14	6.83	8.00
Decatur, Ala	Macon, Miss	327	4.19	5.30	6.09

Southern stresses the fact that, in four of the nine instances shown in table 2, the revenue per ton is less than the variable costs per ton when grain doors are included on shipments from and to those points, and thus those particular rates are noncompensatory. The cost study indicates that the average ratios of revenues to variable costs for shipments of wheat middlings from and to the points shown in table 2 is 1.42 percent and 1.20 percent, excluding and including grain-door expenses, respectively.

National is a trade association whose members process vegetable products, especially those derived from cottonseed, soybeans, and peanuts. Four of National's members operate five processing plants served directly or by reciprocal switching at points on the Southern in the involved territory. A survey shows that the Southern consistently provided grain doors for boxcar shipments of vegetable meal shipped by these five processors on and between May 1, 1976, and May 31, 1977.

Seaboard owns and operates three grain storage facilities and three flour mills served by the Southern. A grain storage facility and a mill are each located at Culpeper, Va., and Cleveland and Chattanooga, Tenn. Seaboard ships bulk shipments of wheat middlings from these origins in interstate commerce to all States in SFA territory, and certain destinations in Ohio, Pennsylvania, New York, New Jersey, Delaware and Maryland. Seaboard estimates that if the respondent cancels the considered tariff items this will cost Seaboard about $28,000 annually to provide the grain doors.

Respondent contends that it has no duty to provide free grain doors because the line-haul rates were not established to include the expense of providing grain doors, citing ***Archer-Daniels-Midland Co.*** v. ***Alton R. Co.***, 246 I.C.C. 421, 427 (1941). It justifies the cancellation of the considered tariff items because the line-haul rates between some of the considered points are noncompensatory when grain doors are included in the service. Also, Southern stresses the fact that it has already canceled similar tariff items applying at other points on its system, without protest.

DISCUSSION AND CONCLUSIONS

Contrary to respondent's contention, grain doors are not dunnage and do not come under the provisions for temporary doors considered in rule 30 of the Uniform Classification. Rather, grain doors are an integral part of boxcars, and carriers which supply boxcars to transport bulk commodities must also furnish grain doors. See ***Furnishing of Grain Doors, Southern Frt. Terr.***, 355

I.C.C. 930, 932, (1977) (*Grain Doors* case), and cases cited therein. In the *Grain Doors* case, the Family Lines System railroads proposed to discontinue the service of furnishing grain doors for shipments of grain moving in boxcars in SFA territory. Therein the Commission, Division 2, based its conclusions on section 1(4) of the act which requires rail common carriers to furnish transportation upon reasonable request, and on section 1(11) which requires rail common carriers to furnish safe and adequate car service. Accordingly, it held that the Family Lines' proposal to cancel the tariff items which provide for the furnishing of grain doors violates section 1(4). It also held that such a proposal would constitute an unreasonable practice in violation of section 1(6).

As noted, the Southern justifies the proposed tariff item cancellation because the rates from and to some of the considered points are noncompensatory when grain doors are included in the service, and are therefore unjust and unreasonable. We disagree for the same reason stated at page 933 of the *Grain Doors* case, *supra*. That is, having concluded that the respondent is obligated to continue furnishing grain doors pursuant to the tariff provisions here proposed to be canceled, we need not reach the issue of the justness and reasonableness of the line-haul rates.

We find that the cancellation of the tariff provisions here under investigation is unlawful in violation of sections 1(4) and 1(6) of the act.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

IT IS ORDERED:

Respondent shall cancel the schedules described in the order entered in this proceeding by division 2 of the Commission, Acting as an Appellate Division, on August 24, 1977, on or before 35 days from the date of service of this report and order, upon not less than 1 day's notice to this Commission and to the general public by filing and posting of the Interstate Commerce Act.

This proceeding is discontinued.

NOTICE: By this order, this proceeding is rendered administratively final in conformity with section 15(8)(a) of the Interstate Commerce Act and within the meaning of section 704 of the Administrative Procedure Act.

No. 36688

BIRMINGHAM RAIL AND LOCOMOTIVE CO., INC. v. ABERDEEN AND ROCKFISH R. CO., ET AL.

Decided October 27, 1978

J. Raymond Clark for complainant.
Duncan B. Phillips and *Ernie D. Cole* for defendants.

Decision

On August 31, 1977, Birmingham Rail and Locomotive Co., Inc. (BRL) filed a formal complaint alleging that a newly published note 47 to the Uniform Freight Classification[1] violated various sections of the Interstate Commerce Act. This provision provides that a locomotive crane[2] tendered for shipment on its own wheels will be inspected at origin by participating carriers[3] to "determine if it is in condition to move at speeds over 35 mph." If it is not, the shipment will be refused unless the shipper opted for special train service at higher rates. In an exception to note 47 published subsequent to institution of this proceeding, Southern Railway System and several other Southern carriers provided for the same limitations as the basic note, with two additions. Carriers subject to the exception will also inspect shipments received in interchange with another carrier. If these shipments could not meet the 35 m.p.h. restriction, they would be refused at that point. However, special train service would only be required over those parts of the route where the carrier operated regular train service at speeds exceeding 35 m.p.h.[4]

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[1] Effective June 30, 1977.

[2] A locomotive crane is customarily used to move extremely heavy loads over a short distance, generally within a heavy industrial facility. Normally, it moves under its own power at relatively slow speeds.

[3] Currently, a substantial majority of the Nation's railroads no longer participate in the disputed note.

[4] Although complainant is located on the lines of carriers subject to the exception, it never amended its complaint to challenge the lawfulness of the exception. Accordingly, this decision only determines the lawfulness of the language in the exception to the extent that it is the same as that in the underlying note 47.

The Administrative Law Judge's initial decision held that the assailed provision had not been shown to be unlawful. BRL's appeal of that decision contends that the 35 m.p.h. restriction is arbitrary and unreasonable, and that the assailed provision is unlawfully vague and ambiguous. We find that note 47, as now written, is unlawfully vague in violation of section 6 of the act.

REASONABLENESS OF THE 35 M.P.H. CUT OFF

Locomotive cranes are not conventional railway equipment, such as box, gondola, or hopper cars, that make up the normal consist of regular freight trains. While they are designed for short runs at slow speeds, locomotive cranes have some capacity for movement on their own wheels in regular, local, or through freight train service. When these cranes are transported in regular, through, or way train service, various structural features of the cranes and their inability to move at higher speeds make them much more susceptible to derailment than other rail equipment.[5] The record indicates that even a particular locomotive crane in good condition may not be able to move consistently at the same speeds as other rail freight cars without substantial danger of derailment.

The cranes have always been inspected before acceptance to insure that they met AAR standards and were in a condition to be handled safely. However, these AAR specifications indicate only whether the crane is generally safe to move and give no consideration to factors that would determine whether the crane is capable of moving at any particular speed without serious risk.

The 35 m.p.h. restriction is based upon actual operation of various railroads participating in note 47 and its exception. On this record the complainant has not met its burden of proof in showing that the use of the particular 35 m.p.h. figure is per se an unreasonable practice in violation of section 1(6) of the act or is otherwise unlawful.

AMBIGUITY OF NOTE 47

Section 6 of the act imposes a duty on carriers to state transportation charges in their tariffs with definiteness and certainty.[6] Rates and rules should be specific[7] so that a shipper will be able to ascertain the correct rate to be charged. Policies should be specifically defined as well as published.[8] When a tariff provision is ambiguous and does not contain clear standards for application it will not lead to the security of uniformity and the same treatment to all shippers alike.

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[5] Locomotive cranes are typically shorter in length than railroad cars and thus have relatively short wheel base which creates a tendency to skew sideways and derail. Additionally, two thirds of the crane's weight is located on the end opposite of the boom. When the crane is transported in freight service, the boom is detached and moves sparately. This creates a serious imbalance. The unnatural stress increases, especially with older cranes, as the speed of the train increases creating a higher risk of derailment.

Note 47, as the complainant points out, does not provide guidelines or criteria which are used by the carrier in determining speed capability of the crane shipments. What factors does the carrier consider to ascertain "the condition" of the crane: weight, age, make of truck, method of preparation for shipment or some other standard? As it now reads, note 47 lacks the specificity necessary to allow the shipping public to be aware in advance of the guidelines that will be utilized in speed determination. Tariff provisions that are dependent in their application upon the convenience or discretion of the carriers are ripe for potential discriminatory practices and therefore are objectionable.

We recognize that requirement of a formula to determine speed capability would prove an impossible burden on the carriers. However, if this note is republished, the factors which the carrier considers in making the determination must be listed. If any factor or factors receive substantially more weight than others, this should also be stated in the tariff.

Additionally, the language which flags out certain carriers from the application of the note, namely "*** provisions of this note will not apply on traffic moving from or to points on or routed via ***", is ambiguous. It appears that this wording might permit any participation by a flag out carrier to nullify the special train charges established by a carrier participating in the note. However, it is also possible to interpret the language to limit only the nonparticipating carriers.[9] This ambiguity could permit an originating railroad subscribing to the note to charge different rates for the same service, depending upon whether the connecting carrier has or has not flagged out. Any republication of this note must contain clear language on these matters, so that potential discrimination can be eliminated.

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[6] *Handling Carload Shipments in West*, 246 I.C.C. 57, 69 (1941).

[7] *Natchez Chamber of Commerce* v. *Director General*, 60 I.C.C. 397, 401 (1920).

[8] No. 35898, Ohio Locomotive Crane Co. *v.* Illinois Central Gulf Railroad Co., affirmed by Commission August 19, 1976.

[9] For example, in a movement from carrier A to carrier C, via connecting carrier B, if only B does not participate in the note, does this preclude A from assessing a special train charge for its part of the movement, or is only carrier B so limited?

EXCEPTION TO NOTE 47

While the exception to note 47[10] is not directly in issue, it has been brought up by both parties and deserves our comments. By pointing out problems peculiar to the exception now, undue protraction of this litigation can be avoided if the note and exception are republished.

First, the present language could be construed to permit a crane found fit at origin to be found unfit later at the discretion of the interchange carrier. This possibility should be eliminated on republication, since the railroads have stated that the purpose of inspection at interchange is to afford like treatment between shipments which have not been inspected by another originating carrier and shipments which originate on the lines of carriers party to the exception (insofar as they move over the latter's lines).

Secondly, the exception provides for application of special train service only over those portions of a carrier's lines where it does not operate regular trains at speeds of 35 m.p.h. or less. To determine special train charges under this provision, would require knowledge of the carrier's operating practices that only the carrier itself would have. Shippers neither have nor are they charged with knowledge of such practices. Under the present provision, there is no way a shipper could determine the applicable tariff charges on a crane forced to move under special train service.

Finally, there is a conflict between the flagout language in the basic note and similar language in the exception. The flagout currently reads: "The provisions of this Note will not apply on traffic (moving on flagout carriers)." The exception will apply to traffic moving on carriers party to it. However, where a movement involves both flagout and exception carriers, the exception would not apply. As the flagout now reads, it applies to the entire note including the exception. Clearer language should be used to indicate the railroads' stated intent that the exception would govern such situations.

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[10] Exception. On traffic moving from or to points on, or routed via Southern Railway System, each shipment will be inspected by Southern Railway System at time of interchange with Southern Railway System (or at origin when located on Southern Railway System) to determine if it can safely move at speeds over 35. Any shipment determined to be incapable of moving at speeds over 35 m.p.h. will be refused, except upon request of shipper such shipment will be handled in special freight train service over those parts of route where Southern Railway System does not operate regular trains at speeds of 35 m.p.h. or less, subject to special freight train service charges which will be in addition to charges otherwise applicable to the shipment.

FINDINGS

(1) The present language of note 47 violates section 6 for the reasons stated above.

(2) This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969. It is not a major action requiring preparation of an energy impact statement under the Energy Policy and Conservation Act of 1975.

It is ordered:

The defendants must cease and desist from the practices found unlawful in this decision.

By the Commission, Division 2, Commissioners Stafford, Gresham, and Christian. Commissioner Christian absent and not participating.

No. 36622

REVISION TO THE RULES GOVERNING THE SEPARATION OF COMMON OPERATING EXPENSES BETWEEN FREIGHT SERVICE AND PASSENGER SERVICE FOR RAILROADS

Decided February 6, 1978

Upon investigation and consideration of views, arguments, and representations of the parties, certain revised reporting requirements governing class I railroad companies including class I switching and terminal companies (49 CFR 1240.1) subject to our separation rules 1242 are adopted to be effective January 1, 1978.

Donald A. Brinkworth for the Consolidated Rail Corporation.
Hollis G. Duensing for the Association of American Railroads.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

By notice of proposed rulemaking served under docket No. 36622 (notice), on September 1, 1977, and published in the Federal Register on September 9, 1977 (42 F.R. 45346), the Commission made public that it had under consideration a general revision of the Rules Governing the Separation of Common Operating Expenses Between Freight and Passenger Service for Railroads (separation rules) (49 CFR 1242). The purpose of this revision is to conform the Separation Rules to the revised Uniform System of Accounts for Railroads (USOA) (49 CFR 1201) served on June 24, 1977, under docket No. 36367, effective January 1, 1978.

All interested parties were given the opportunity to submit their views in writting by October 12, 1977.

BACKGROUND

The previous separation rules were based on fully shared costs in which freight and passenger services are each assigned its full and fairly allocated portion of total expenses. These rules were constructed on the premise that both freight and passenger services were to be provided in the long run and that the cost of providing one service should not be burdened with costs associated in any way with the other service. Further, docket No. 34013, Rules to Govern the Assembling and Presenting of Cost Evidence, decided in July 1970, requires the exclusion of passenger deficits from freight costs for ratemaking purposes.

Also, the previous separation rules addressed the expense account assignment of solely related freight and solely related passenger expenses as well as expenses common to both services. This was necessary since the USOA did not provide separate accounts for each type of service.

The revised separation rules continue to use fully allocated cost concepts. Full costing is supported by the long-term nature of passenger service, which is evidenced by Federal, State, and local governments' increased commitments to continuing, improving, and expanding commuter and intercity passenger service.

The revised rules focus on the separation of only the common expense accounts between freight service and passenger service. The revised USOA (docket No. 36367) provides a three-tier account structure for solely related freight, solely related passenger, and common services. Consequently, the revised separation rules need not address the assignment of solely related expenses.

The revised USOA utilizes a natural expense concept that maintains separate accounts for labor, material, and other expenses. The separation rules maintain this distinction and require the carrier to separate the common expenses on a natural expense basis.

The separation rules continue to use allocation bases that encompass operating statistics, solely related freight/passenger ratios, and other common account apportionments. We have initiated certain refinements in order to be more specific, reduce the complexity of an already complex formula, and improve the rationale for allocation bases.

REPRESENTATIONS

We specifically solicited comments and suggestions from interested parties on the allocation bases used in the separation rules. As a result of written comments received in this proceedings, we have incorporated certain proposed changes in the separation rules. The specific representations are detailed below followed by appropriate discussions and conclusions.

Separation rules and subsidy standards.—Consolidated Rail Corporation (Conrail), had no objection to the proposed methodology for separating common operating expenses between freight service and passenger service. However, Conrail stated that the separation rules should not amend the Standards for Determining Commuter Rail Service Continuation Subsidies and Emergency Operating Payments promulgated by the Rail Services Planning Office (RSPO) (49 CFR Part 1127).

Quarterly reports.—The Association of American Railroads (AAR), contended that the reference in section 1242.0 to quarterly reports should be deleted since there is no reference in the present separation rules and since the revised USOA makes no reference to quarterly reports.

Reporting apportioned common expenses.—The AAR suggested that the last sentence in section 1242.0 be changed from the reference to reporting common apportionments to read, "The carrier shall report freight and passenger expenses to the Commission as required by annual or other reports."

Note on carrier relief.—The AAR suggested that the note on page 17, dealing with individual carrier relief from any specific separation rule that is an undue accounting burden, be included as part of section 1242.0.

Section 1242.04, special tests.—The AAR suggested that section 1242.04, special tests, be introduced as follows:

> The results of special tests or specific information may be substituted for procedures described herein where a reasonable or improved separation of common expenses results.

Number "98" in function account group (section 1242.05).—The AAR stated that the reference to function 98 in section 1242.05, operating expense account number notation, is not included in the revised USOA and requires additional explanation.

Way and structures accounts 21-XX-13, 21-XX-14, 21-XX-15, and 21-XX-18 (section 1242.15).—The AAR maintained that under section 1242.15, accounts 21-17-13 to 21-18-16 should be revised to read XX-17-13 to XX-18-16, to provide for purchased services expenses related to these functions.

Separation of expenses in sections 1242.26 and 1242.28.—The AAR suggested that the separation of sections 1242.26 and 1242.28 be based on the separation of expenses relating to track structure.

Separation of expenses in sections 1242.31, 1242.32, 1242.52, and 1242.53.—The AAR stated that the separation of sections 1242.31

and 1242.32 should be based on 1242.14 and the separation of sections 1242.52 and 1242.53 should be based on 1242.43 to eliminate possible distortion when only one solely related class of service exists with common service.

Separation basis of section 1242.34, administration.—The AAR recommended that under section 1242.34, administration, acount 62-26-00, depreciation, be deleted since no valid relationship exists.

Section 1242.35, repair and maintenance.—Under section 1242.35, repair and maintenance, AAR recommended the word "Where" be inserted immediately after (a), (b), and (c) to introduce the instructions. Also, an option to utilize locomotive ton miles or locomotive unit miles should be provided.

Separation basis of section 1242.43, administration.—Under section 1242.43, administration, AAR recommended the elimination of computer and data processing equipment (XX-27-46) as a basis for allocation since no relationship exists between the functions of administration, on the one hand, and, computers and data processing, on the other.

Separation basis for section 1242.79, communication systems operations.—AAR maintained that the separation of common expenses under section 1242.79, communication system operations, should be the same as section 1242.18, communication systems.

Separation basis for public relations and advertising expenses under section 1242.84.—Under section 1242.84, the AAR believed that public relations and advertising expenses (XX-63-93) should be assigned to freight or passenger service only.

Complexity of separation rules.—The AAR stated that railroads are concerned that several of the rules are unduly complicated. As an example, AAR mentions sections 1242.14 and 1242.16, which respectively deal with the separation of administration—other and road property damaged—other.

Discussion and Conclusions

The issues raised by the respondents to this proceeding are discussed below.

Separation rules and subsidy standards.—Section 205(d)(5) of the Regional Rail Reorganization Act of 1973 as amended by the Rail Revitalization and Regulatory Reform Act of 1976, directs the RSPO to determine and publish standards for the computation of subsidies for commuter rail service. Further, section 205(d)(6) of the act authorizes the RSPO to determine and publish standards for defining revenue attributable to rail properties, avoidable cost of providing service, and reasonable return on value. Accordingly, RSPO published Standards for Determining Commuter Rail Service Continuation Subsidies and Emergency Operating Payments (49 CFR 1127). These standards use a methodology of apportioning expenses based on specific accounts prescribed by the USOA (49 CFR 1201).

Conrail expressed concern that the revised separation rules would amend these subsidy standards. However, the revised separation rules base the common expense allocations on the revised USOA effective January 1, 1978. RSPO will, under a separate rulemaking, align its published standards to the revised USOA. The revised subsidy standards may use allocations from the revised separation rules; however, the direct cause of changes to the separation rules and changes to the subsidy standards is the revised USOA.

Quarterly reports.—The AAR contended that we should delete the requirement in section 1242.0 that carriers use the separation rules in quarterly reports.

Ex Parte No. 290, *Procedures Governing Rail General Increase Proc.*, 351 I.C.C. 544 (1976), requires carriers to submit freight traffic cost data on the most recent four-quarter period (beginning four months after the close of a calendar year quarter). This requires the apportionment of common expenses to freight and passenger services for periods which may not correspond to calendar years. As a result the separation rules must be used for reports other than annual but not for regular quarterly reporting to the Commission. Accordingly, we have revised section 1242.0 to delete the reference to quarterly reports.

Reporting apportioned common expenses.—AAR suggested we change the last sentence in section 1242.0 from "*** report common expense apportionments ***" to "*** report freight and passenger expenses***".

This would materially alter the intent of the last sentence which is to ensure that carriers will maintain supportive data of common expense apportionments to freight and passenger services and report such apportionments when needed by the Commission. We have changed the last sentence in section 1242.0 to more clearly reflect this intention.

Note on carrier relief.—The AAR suggested we insert the note on carrier relief in section 1242.0 rather than at the end of the separation rules. Since the note is an exception to the separation rules and requires carriers to fully support their requests, we have not changed the position of the note.

Section 1242.04, special tests.—The AAR's request for more flexibility to use special tests or specific information as a substitute for procedures described in the separation rules introduces a significant loophole which could undermine general uniformity of the rules as written. Further, the note discussing carrier relief provides the procedures that must be followed to deviate from the separation rules. Consequently, we have not changed section 1242.04.

Number "98" in function account group.—(section 1242.05).—The AAR's statement that the last paragraph of section 1242.05 refers to function "98" reflects a misunderstanding about the intent of the number "98." The number "98" in the function account group is an aggregation of several functions which avoids the unnecessary detail of listing all the accounts which are aggregated to form one freight-passenger separation instruction. The number "98" is not contained in the USOA; its use is limited to the separation rules. We have modified the explanation of "98" to clarify its purpose.

Way and structures accounts 21-XX-13, 21-XX-14, 21-XX-15, and 21-XX-18 (section 1242.15).—We disagree with the AAR's request to change functions 13, 14, 15, and 16 to provide for purchased services of these functions. The USOA shows these functions as material (21-XX-XX) functions only (40 CFR 1201). Accordingly, we have not changed section 1242.15. If these functions are later opened to other natural expenses, we shall revise the separation rules accordingly.

Separation of expenses in sections 1242.26 and 1242.28.—We concur with the AAR's recommendation that common expenses pertaining to sections 1242.26, miscellaneous buildings and structures, and 1242.28, roadway machines, small tools and supplies, and snow removal, be separated on the basis of the separation of common track structure expenses. Virtually all of sections 1242.26 and 1242.28 relate to maintenance of road and right-of-way. We have revised the instructions to sections 1242.26 and 1242.28 accordingly. Further, we have deleted from the allocation basis of section 1242.10, roadway machines (XX-19-36) and snow removal (XX-19-38), so that this separation computation is feasible.

Separation of expenses in sections 1242.31, 1242.32, 1242.52, and 1242.53.—Sections 1242.31, 1242.32 1242.52, and 1242.53 as written eliminate any distortion that may occur when only one solely related class of service exists. The alternatives listed in the instructions are in the order of preference. The least preferred is that suggested by the AAR. We believe the AAR's statement does not contradict the text. Accordingly, we have made no changes.

Separation basis of section 1242.34.—We have deleted account 62-26-00, depreciation, from the allocation basis for accounts XX-26-01, equipment administration (section 1242.34). While some administration expense is connected with maintaining depreciation records, the amount is on a much lower ratio than for the other expenses listed as a basis of distributing administration.

Section 1242.35, repair and maintenance.—We have revised section 1242.35 to include the word "Where" immediately after (a), (b), and (c). Also we restored the option to utilize either locomotive ton-miles or locomotive unit miles. These options were contained in the previous separation rules and provide railroads the choice of selecting the service unit which best reflect their operations.

Separation basis of section 1242.43, administration.—We concur with the AAR on its request to eliminate computers and data processing equipment (XX-27-46) from the allocation basis for other equipment administration. Since virtually all maintenance and repair expenses associated with computers are purchased services, accounts XX-27-46, should not be used as a basis for apportioning administrative expense. Accordingly, we have deleted XX-27-46 from the allocation base.

Separation basis for section 1242.79, communication systems operations.—We have revised section 1242.79 to adopt AAR's recommendation that the basis of allocation be the same as it is for way and structures—other, repair and maintenance, communication systems (XX-13-20) (section 1242.18). The basis for separation was essentially the same with the exception that section 1242.79 included administration support under the transportation activity. We see no fundamental difference and believe the AAR recommendation helps simplify the common expense separation.

Separation basis for public relations and advertising expenses under section 1242.84.—We disagree with the AAR contention that public relations and advertising expenses (accounts XX-63-93) should be changed to exclude common expenses. If the only expenses are solely related to freight and/or passenger services, the expenses are assigned to the solely related account(s). However, in cases where common public relations and advertising expenses occur, their apportionment must be addressed by the separation rules.

Complexity of separation rules.—The AAR expressed railroad concern about the complexity of many rules and cited two examples. We realize that the revised separation rules are more complex than the previous rules. This is due largely to an increased number of accounts and the natural expense account structure which maintains separate accounts for labor, material, and other natural expense elements.

We note that the AAR has not presented specific alternatives which would be equally or more appropriate. If experience with the new rules reveals any undue complexities, we will, of course, test alternatives to determine if acceptable results can be obtained from a simpler approach.

FINDINGS

We find that Part 1242 of Title 49 of the Code of Federal Regulations should be amended as detailed in the appended statement of changes; and that such rules are reasonable and necessary to the effective enforcement of the provision of Part I of the Interstate Commerce Act, as amended; that such rules are otherwise lawful and, to the extent so found in this report, consistent with the public interest and the national transportation policy; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

APPENDIX A

Part 1242, Chapter X, Title 49 of the Code of Federal Regulations in revised as follows:

PART 1242—SEPARATION OF COMMON OPERATING EXPENSES BETWEEN FREIGHT SERVICE AND PASSENGER SERVICE FOR RAILROADS[1]

LIST OF INSTRUCTIONS

Sec.
1242.0 Separation of common operating expenses.

GENERAL

1242.01 Expenses solely related to freight service and passenger service.
1242.02 Common expenses.
1242.03 Made by accounting divisions.
1242.04 Special tests.
1242.05 Operating expense account number notation.
1242.06 Instructions for separation.

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[1] The accounts mentioned in this part refer to and agree with part 1201 of this chapter.

OPERATING EXPENSES WAY AND STRUCTURES

Sec.
1242.10 Administration—track (accounts XX-19-02).
1242.11 Administration—bridges and buildings (accounts XX-19-03).
1242.12 Administration—signals (accounts XX-19-04).
1242.13 Administration—communications (accounts XX-19-05).
1242.14 Administration—other (accounts XX-19-06).
1242.15 Roadway, tunnels and subways, bridges and culverts, ties, rails, other track materials, ballast, track laying and surfacing, and road property damaged (accounts XX-17-10 to XX-18-12, inclusive; 21-17-13 to 21-18-16, inclusive; XX-17-17, XX-18-17, XX-17-48 and XX-18-48).
1242.16 Road property damaged—other (accounts XX-19-48).
1242.17 Signals and interlockers (accounts XX-17-19 amd XX-18-19).
1242.18 Communication systems (accounts XX-19-20).
1242.19 Electric power systems (accounts XX-19-21).
1242.20 Highway grade crossings (accounts XX-17-22 and XX-18-22).
1242.21 Station and office buildings (accounts XX-19-23).
1242.22 Shop buildings—locomotives (accounts XX-19-24).
1242.23 Shop buildings—freight cars (accounts XX-13-25).
1242.24 Shop buildings—other equipment (accounts XX-19-26).
1242.25 Locomotive serving facilities (accounts XX-19-27).
1242.26 Miscellaneous buildings and structures (accounts XX-19-28).
1242.27 Coal marine terminals, ore marine terminals, TOFC/COFC terminals, other marine terminals, motor vehicle loading and distribution facilities, and facilities for other specialized service operations (accounts XX-13-29 to XX-13-35, inclusive).
1242.28 Roadway machines, small tools and supplies, and snow removal (accounts XX-19-36 to XX-19-38, inclusive).
1242.29 Fringe benefits (accounts 12-17-00, 12-18-00, 12-19-00).
1242.30 Dismantling retired road property and depreciation (accounts XX-17-39, XX-18-39, XX-19-39, 62-17-00, 62-18-00, and 62-19-00).
1242.31 Lease rentals—debit and credit, and other rents—debit and credit (accounts 31-17-00, 31-18-00, 31-19-00, 32-17-00, 32-18-00, 32-19-00, 35-17-00, 35-18-00, 35-19-00, 36-17-00, 36-18-00, and 36-19-00).
1242.32 Joint facility rents—debit and credit and joint facility—debit and credit (accounts 33-17-00, 33-18-00, 33-19-00, 34-17-00, 34-18-00, 34-19-00, 37-17-00, 37-18-00, 37-19-00, 38-17-00, 38-18-00, and 38-19-00).
1242.33 Other expenses and casualties and insurance (accounts XX-17-99, XX-18-99, XX-19-99, 50-17-00, 50-18-00, and 50-19-00).

EQUIPMENT—LOCOMOTIVES

1242.34 Administration (accounts XX-26-01).
1242.35 Repair and maintenance (accounts XX-26-41).
1242.36 Machinery repair and equipment damaged (accounts XX-26-40 and XX-26-48).
1242.37 Dismantling retired property and depreciation (accounts XX-26-39 and 62-26-00).
1242.38 Fringe benefits (account 12-26-00).

Sec.

1242.39 Lease rentals—debit and credit, other rents—debit and credit, and repairs billed to others (accounts 31-26-00, 32-26-00, 35-26-00, 36-26-00, and 40-26-98).

1242.40 Joint facility rents—debit and credit, and joint facility—debit and credit (accounts 33-26-00, 34-26-00, 37-26-00 and 38-26-00).

1242.41 Other and casualties and insurance (accounts XX-26-99 and 50-26-00).

EQUIPMENT—FREIGHT CARS

1242.42 Administration, repair and maintenance, machinery repair, equipment damaged, dismantling retired property, fringe benefits, other casualties and insurance, lease rentals, joint facility rents, other rents, depreciation, joint facility, repairs billed to others, and other (accounts XX-22-01, XX-22-42, XX-22-40, XX-22-48, XX-22-39, 12-22-00, 50-22-00, 31-22-00 to 38-22-00 inclusive, 62-22-00, 40-22-98, and XX-22-99).

EQUIPMENT—OTHER EQUIPMENT

1242.43 Administration (accounts XX-27-01).

1242.44 Truck, trailers, and containers-revenue service and floating equipment-revenue service (accounts XX-23-43 and XX-23-44).

1242.45 Passenger and other revenue equipment (accounts XX-27-45).

1242.46 Computers and data processing equipment (accounts XX-27-46).

1242.47 Machinery (accounts XX-27-40).

1242.48 Work and other non-revenue equipment (accounts XX-27-47).

1242.49 Equipment damaged (accounts XX-27-48).

1242.50 Fringe benefits (account 12-27-00).

1242.51 Dismantling retired property and depreciation (accounts XX-27-39 and 62-27-00).

1242.52 Lease rentals—debit and credit, other rents—debit and credit, and repairs billed to others—credit (accounts 31-27-00, 32-27-00, 35-27-00, 36-27-00, and 40-27-98).

1242.53 Joint facility rents—debit and credit and joint facility—debit and credit (accounts 33-27-00, 34-27-00, 37-27-00 and 38-27-00).

1242.54 Other and casualties and insurance (accounts XX-27-99 and 50-27-00).

TRANSPORTATION—TRAIN OPERATIONS

1242.55 Administration (accounts XX-51-01).

1242.56 Engine crews and train crews (accounts XX-51-56 and XX-51-57).

1242.57 Dispatching trains (accounts XX-51-58).

1242.58 Operating signals and interlockers, operating drawbridges, and highway crossing protection (accounts XX-51-59, XX-51-60 and XX-51-62).

1242.59 Train inspection and lubrication (accounts XX-51-62).

1242.60 Locomotive fuel, electric power purchased/produced for motive power, and servicing locomotives (accounts XX-51-67, XX-51-68 and XX-51-69).

1242.61 Freight lost or damaged—solely related (to train) (account 51-51-00).

1242.62 Clearing wrecks (accounts XX-51-63).

1242.63 Fringe benefits (account 12-51-00).

1242.64 Joint facility—debit and credit (accounts 37-51-00 and 38-51-00).

1242.65 Other and casualties and insurance (accounts XX-51-99 and 50-51-00).

TRANSPORTATION—YARD OPERATIONS

Sec.

1242.66 Administration (accounts XX-52-01).

1242.67 Switch crews; controlling operations; yard and terminal clerical; operating switches, signals, retarders, and humps; locomotive fuel; electric power purchased/produced for motive power; and servicing locomotives (accounts XX-52-64, XX-52-65, XX-52-66, XX-52-59, XX-52-67, XX-52-68, and XX-52-69).

1242.68 Freight lost or damaged—solely related (to yard) (account 51-52-00).

1242.69 Clearing wrecks (accounts XX-52-63).

1242.70 Fringe benefits (account 12-52-00).

1242.71 Joint facility—debit and credit (accounts 37-52-00 and 38-52-00).

1242.72 Other and casualties and insurance (accounts XX-52-99 and 50-52-00).

TRANSPORTATION—TRAIN AND YARD OPERATIONS COMMON

1242.73 Cleaning car interiors and freight lost and damaged—all other (accounts XX-53-70 and 51-53-00).

1242.74 Adjusting and transferring loads and car loading devices and grain doors (accounts XX-33-71 and XX-33-72).

1242.75 Fringe benefits (account 12-53-00).

TRANSPORTATION—SPECIALIZED SERVICE OPERATIONS

1242.76 Administration; pickup and delivery, marine line haul and rail substitute service; loading, unloading and local marine; protective services; freight lost or damaged—solely related; fringe benefits; casualties and insurance; joint facility—debit and credit; and other (accounts XX-34-01, XX-34-73, XX-34-74, XX-34-75, 51-34-00, 12-34-00, 50-34-00, 37-34-00, 38-34-00, and XX-34-99).

TRANSPORTATION—ADMINISTRATIVE SUPPORT OPERATIONS

1242.77 Administration (accounts XX-55-01).

1242.78 Employees performing clerical and accounting functions, and loss and damage claims processing (accounts XX-55-76 and XX-55-78).

1242.79 Communication systems operations (accounts XX-55-77).

1242.80 Fringe benefits (account 12-55-00).

1242.81 Joint facility—debit and credit (accounts 37-55-00 and 38-55-00).

1242.82 Other and casualties and insurance (accounts XX-55-99 and 50-55-00).

GENERAL AND ADMINISTRATION

1242.83 Officers—general superintendence; accounting, auditing and finance; management services and data processing; personnel and labor relations; legal and secretarial; research and development; writedown of uncollectible accounts; property taxes; other taxes except on corporate income or payrolls; and other (accounts XX-63-01, XX-63-86, XX-63-87, XX-63-91, XX-63-92, XX-63-94, 63-63-00, 64-63-00, 65-63-00, and XX-63-99).

Sec.
1242.84 Marketing, sales, and public relations and advertising (accounts XX-63-88, XX-63-89 and XX-63-93).
1242.85 Fringe benefits (account 12-63-00).
1242.86 Industrial development (accounts XX-61-90).
1242.87 Joint facility—debit and credit and casualties and insurance (accounts 37-63-00, 38-63-00 and 50-63-00).

1242.0 *Separation of common operating expense.*

Commencing with annual reports for the year 1978 or for any portion thereof until further order, all class I railroad companies including class I switching and terminal companies (section 1240.1 of this chapter) subject to section 20 of the Interstate Commerce Act as amended shall separate operating expenses common to both freight service and passenger service in accordance with the regulation in this part.

The carrier shall maintain records supporting its common operating expense apportionments to freight and passenger services. The carrier shall report common expense apportionments to the Commission as required.

GENERAL

1242.01 *Expenses solely related to freight service and passenger service.*

The Uniform System of Accounts for Railroad Companies (49 CFR 1201) requires that carriers assign directly to freight service or to passenger service, including allied services, the expenses, taxes and purchased services incurred solely for the benefit of either freight or passenger service.

1242.02 *Common expense.*

The Uniform System of Accounts also requires that carriers assign to common expense accounts the remaining expenses, taxes and purchased service which are not solely related to either freight or passenger service. The following instructions govern the separation of common expense accounts between freight and passenger services.

1242.03 *Made by accounting divisions.*

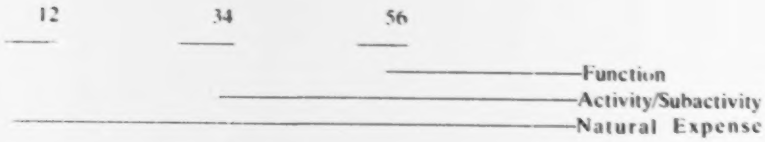
The separation shall be made by accounting divisions, where such divisions are maintained, and the aggregate of the accounting divisions reported for the quarter and for the year.

1242.04 *Special tests.*

When the separation of common expense account between freight and passenger services is based upon special tests or service unit factors, such tests shall be made at sufficiently frequent intervals to represent actual operating conditions. The service unit factors used are those of the reporting period.

1242.05 *Operating expense account number notation.*

The operating expense account numbers consist of a 6-digit coding structure divided into three 2-digit groups. The first 2-digit group denotes natural expenses; the second group denotes activities/subactivities for freight, passenger or common service; and the third group signifies applicable function assignment.



For reporting purposes, four natural expense categories are utilized. The categories are: salaries and wages (accounts 11-XX-XX); material, tools, supplies, fuels and lubricants (accounts 21-XX-XX); purchased services (accounts 31-XX-XX to 41-XX-XX, inclusive); and general (accounts 61-XX-XX to 65-XX-XX, inclusive, 51-XX-XX, 52-XX-XX, 53-XX-XX and 12-XX-XX).

The symbol "XX" in the first 2-digit group is used throughout the separation instructions to denote more than one natural expense associated with the same activity/subactivity function account structure. For reporting purposes, the natural expense account numbers represented by "XX" include:

11—Salaries and wages;
21—Materials, tools, supplies, fuels, lubricants;
30 or 41—Purchased services:
    30—Summation of certain purchased service accounts,
    41—Other purchased services;
61—General.

The "30" natural expense designation indicates a summation of specific purchased service accounts that are reported in total rather than individually. The specific accounts under the way and structures activity except for administration functions include 39-1X-XX, Repairs billed by others, dr.; 40-1X-XX, Repairs billed to others, cr.; and 41-1X-XX, Other purchased services. For the equipment activity excluding administration functions, the "30" designation denotes the summation of 39-2X-XX and 41-2X-XX.

The "41" natural expense designation (other purchased services) is the purchased service category of the "XX" code for the following:

1. Way and structures activity administration function accounts.
2. Equipment activity administration function accounts.
3. Transportation activity expense accounts.
4. General and administration activity expense accounts.

The "61" general natural expense designation is applicable to all accounts with the "XX" symbol except transportation, train and yards accounts (XX-(33/43/53)-XX).

The natural expense account number "50" is used throughout the separation instructions to indicate the summation of accounts 52-XX-XX, Other casualties, and 53-XX-XX, insurance, that are reported as one item, "casualties and insurance," (50-XX-XX).

The number "98" in the function account group (last two digits) is used in the separation rules to designate the summation of a natural expense consisting of more than one functional assignment that is reported as one item. This includes repairs billed to others, cr.—equipment (40-2X-XX). For example, the locomotive subactivity contains accounts 40-(21 /24/26)-40, 40-(21/24/26)-41, and 40-(21/24/26)-48 which are treated as 40-(21/24/26)-98.

1242.06 ***Instructions for separation.***

Certain instructions for separating common expense accounts (dependent accounts) between freight and passenger services base the allocation on the proportional freight/passenger separation of other common expense accounts (independent accounts). The dependent account is frequently identified by an "XX" symbol in the natural expense position (first two digits) with corresponding independent accounts also identified by the "XX" natural expense symbol. Unless otherwise stated, the applicable natural expense associated with the "XX" symbol shall be the same for both the dependent and independent accounts.

To illustrate, section 1242.10 provides instructions for separating common way and structures, administration—track accounts (dependent accounts) designated by XX-19-02. The separation is based on certain other common way and structures accounts including roadway—running, XX-17-10, and roadway—switching, XX-18-10.

As section 1242.05 states, the "XX" symbol denotes the following natural expenses for way and structures administration functions:

11—Salaries and wages.
21—Materials, tools, supplies, fuels, lubricants.
41—Other purchased services.
61—General.

These natural expenses shall be individually applied to the separation rules in section 1242.10. In each case, the independent accounts providing the basis for freight/passenger separation of the dependent account shall have the same natural expense designation. For example, the basis of separating account 11-19-02, salaries and wages, way and structures, administration—track, would be based on certain independent accounts including 11-17/18-10, salaries and wages, way and structures, running/switching, repair and maintenance, roadway.

OPERATING EXPENSES WAY AND STRUCTURES

1242.10 ***Administration—track (accounts XX-19-02).***

Separate common administration/track expenses between freight and passenger services in the same proportion as the common expenses of the following accounts are separated between freight and passenger services:

- Roadway:
  - Running (XX-17-10)
  - Switching (XX-18-10)
- Ties:
  - Running (21-17-13)
  - Switching (21-18-13)
- Rails:
  - Running (21-17-14)
  - Switching (21-18-14)
- Other track materials:
  - Running (21-17-15)
  - Switching (21-18-15)

- Ballast:
    - Running (21-17-16)
    - Switching (21-18-16)
- Track laying and surfacing:
    - Running (XX-17-17)
    - Switching (XX-18-17)
- Road property damaged:
    - Running (XX-17-48)
    - Switching (XX-18-48)
    - Other (XX-19-48)
- Dismantling retired road property:
    - Running (XX-17-39)
    - Switching (XX-18-39)
    - Other (XX-19-39)

1242.11 *Administration—bridges and buildings (accounts XX-19-03).*

Separate common administration/bridges and buildings expenses between freight and passenger services in the same proportion as the common expenses of the following accounts are separated between freight and passenger services:

- Tunnels and subways:
    - Running (XX-17-11)
    - Switching (XX-18-11)
- Bridges and culverts:
    - Running (XX-17-12)
    - Switching (XX-18-12)
- Electric power systems (XX-19-21)
- Station and office buildings (XX-19-23)
- Shop buildings:
    - Locomotives (XX-19-24)
    - Other equipment (XX-19-26)
- Locomotive servicing facilities (XX-19-27)
- Miscellaneous buildings and structures (XX-19-28)

1242.12 *Administration—signals (accounts XX-19-04).*

Separate common administration/signals expenses between freight and passenger services in the same proportion as the common expenses of the following accounts are separated between freight and passenger services:

- Signals and interlockers:
    - Running (XX-17-19)
    - Switching (XX-18-19)

1242.13 *Administration—communications (accounts XX-19-05).*

Separate common administration/communications expenses between freight and passenger services in the same proportion as the common expenses of the following accounts are separated between freight and passenger services:

- Communications systems (XX-19-20)

1242.14 *Administration—other (accounts XX-19-06).*

Separate common administration/other expenses between freight and passenger services in the same proportion as the common expenses of the following accounts are separated between freight and passenger services:

Administration:
  Track (XX-19-02)
  Bridges and buildings (XX-19-03)
  Signals (XX-19-04)
  Communications (XX-19-05)

1242.15 *Roadway, tunnels and subways, bridges and culverts, ties, rails, other track material, ballast, track laying and surfacing, and road property damaged (accounts XX-17-10 to XX-18-12 inclusive, 21-17-13 to 21-18-16 inclusive, XX-17-17, XX-18-17, XX-17-48 and XX-18-48).*

The expenses for running and switching subactivities shall be separated between freight service and passenger service as follows:

(1) *Switching tracks.*—(a) Yard: Expenses for yards used in common by freight and passenger services shall be apportioned on the basis of the respective switching locomotive unit-hours in the common yards. (b) Way: Where the tracks at any one location are used in common by both freight and passenger services, expenses may be assigned to that service which makes the dominant use of them.

(2) *Running tracks.*—The expenses of tracks used in common by both services shall be apportioned on the basis of gross ton-miles (including locomotive ton-miles) handled over these tracks in the respective services.

1242.16 *Road property damaged—other (accounts XX-19-48).*

Separate common expenses in proportion to the total common expenses assigned to freight/passenger from the following way and structures accounts:

Road property damaged—running (XX-17-48)
Road property damaged—switching (XX-18-48)

1242.17 *Signals and interlockers (accounts XX-17-19 and XX-18-19).*

Separate common expenses on the basis of the total train hours in running service, and/or the yard switching plus train switching hours in the switching service over the tracks on whic'. the common signals and interlockers are used.

1242.18 *Communication systems (accounts XX-19-20).*

Separate common expenses on the basis of the common expenses separation in:

Way and structures—administration—track, bridges and culverts, and signals (accounts XX-19-02 to XX-19-04, inclusive).

Equipment—administration—locomotives and other equipment (accounts XX-26-01 and XX-27-01).

Transportation—administration—train, yard, and administrative support (accounts XX-51-01, XX-52-01, and XX-55-01).

Dispatching trains (accounts XX-51-58)

1242.19 *Electric power systems (accounts XX-19-21).*

Separate common expenses on basis of common expenses of electric power purchased or produced for motive power (accounts XX-51-68 and XX-52-68).

1242.20 *Highway grade crossings (accounts XX-17-22 and XX-18-22).*

Separate running and switching common expenses according to distribution of the running and switching portions only of common expense accounts listed in section 1242.10, Administration—track (accounts XX-19-02).

1242.21 *Station and office buildings (accounts XX-19-23).*

If the sum of the direct freight and the direct passenger expenses is more than 50 percent of the total charges to this account for an accounting division, separate the common expenses on the basis of the directly assigned expenses in this account for the accounting division involved. If the sum of the direct freight and the direct passenger expenses does not aggregate to more than 50 percent of the total charges for an accounting division, the common expenses should be separated on the basis of special test. Where common expenses exist in an accounting division but the direct expenses are applicable to only one service, i.e., freight or passenger, the common expenses shall be separated on the basis of a special test. If the accounting is performed on a system basis rather than by accounting divisions, the common expenses shall be separated on the basis of a special study.

1242.22 *Shop buildings—locomotives (accounts XX-19-24).*

Separate common expenses according to distribution of common expenses in the following accounts:

Machinery repair (XX-26-40)
Locomotive—repair and maintenance (XX-26-41)

1242.23 *Shop buildings—freight cars (accounts XX-13-25).*

These accounts pertain solely to freight service and contain no common expense for separation herein.

1242.24 *Shop buildings—other equipment (accounts XX-19-26).*

Assign directly to freight (or as particular facts suggest otherwise).

1242.25 *Locomotive servicing facilities (accounts XX-19-27).*

Separate common expenses according to distribution of common expenses in the following accounts:

Locomotive fuel (XX-51-67 and XX-52-67)
Electric power purchased or produced for motive power (XX-51-68 and XX-52-68)
Servicing locomotives (XX-51-69 and XX-52-69)

1242.26 *Miscellaneous buildings and structures (accounts XX-19-28).*

Separate common expenses as specific facts indicate or according to distribution of common expenses listed in section 1242.10, Administration—track (accounts XX-19-02).

1242.27 *Coal marine terminals, ore marine terminals, TOFC/COFC terminals, other marine terminals, motor vehicle loading and distribution facilities, and facilities for other specialized service operations (accounts XX-13-29 to XX-13-35, inclusive).*

These accounts pertain solely to freight service and contain no common expenses for separation herein.

1242.28 *Roadway machines, small tools and supplies, and snow removal (accounts XX-19-36 to XX-19-38, inclusive).*

Separate common expenses according to distribution of common expenses listed in section 1242.10, administration—track (accounts XX-19-02).

1242.29 *Fringe benefits (accounts 12-17-00, 12-18-00, and 12-19-00).*

Separate common expenses in the running subactivity in the same proportion as the salaries and wages, way and structures, common expenses in all accounts with a designated running subactivity. Separate common expenses in the switching subactivity in the same proportion as the salaries and wages, way and structure, common expense accounts with a designated switching activity. Separate common expenses in the other subactivity in the same proportion as the salaries and wages, way and structures, common expenses in all accounts with a designated other subactivity.

1242.30 *Dismantling retired road property and depreciation (accounts XX-17-39, XX-18-39, XX-19-39, 62-17-00, 62-18-00 and 62-19-00).*

Separate common expenses in each account for each subactivity (running, switching and other) in proportion to the separation of common repair and maintenance expenses associated with the particular common properties depreciated and/or dismantled.

1242.31 *Lease rentals—debit and credit and other rents—debit and credit (accounts 31-17-00, 31-18-00, 31-19-00, 32-17-00, 32-18-00, 32-19-00, 35-17-00, 35-18-00, 35-19-00, 36-17-00, 36-18-00, and 36-19-00).*

Separate common debit expense accounts in each subactivity (running, switching and other) in proportion to the separation of solely related freight or passenger service in each account. If there are no solely related expenses in an account or if the solely related expenses are assignable entirely to freight or to passenger service, separate common debit expense accounts on the basis of the same percentages calculated for the separation of administration—other (accounts XX-19-06).

Separate all common credit expense accounts on the same percentages calculated for the separation of administration—other (accounts XX-19-06).

1242.32 *Joint facility rents—debit and credit and joint facility—debit and credit (accounts 33-17-00, 33-18-00, 33-19-00, 34-17-00, 34-18-00, 34-19-00, 37-17-00, 37-18-00, 37-19-00, 38-17-00, 38-18-00, and 38-19-00).*

Solely related (freight or passenger service) debit expense accounts in each subactivity (running, switching and other) shall be assigned according to the use made of each facility by the reporting carrier, regardless of the use by other carriers. Common debit expenses shall be separated on the basis of the percentage separations of the solely related expenses in each individual account. If there are no solely related expenses or if the solely related expenses are assigned entirely to freight or to passenger service, separate common debit expenses on the same percentages calculated for the separation of administrative—other (accounts XX-19-06).

Separate all common credit expense accounts on the same percentages calculated for the separation of administration—other (accounts XX-19-06).

1242.33 *Other expenses and casualties and insurance (accounts XX-17-99, XX-18-99, XX-19-99, 50-17-00, 50-18-00 and 50-19-00).*

Separate common expenses on the basis of the percentages calculated for the separation of administration—other (accounts XX-19-06).

OPERATING EXPENSES—EQUIPMENT

LOCOMOTIVES

1242.34 *Administration (accounts XX-26-01).*

Separate common expenses according to distribution of common expenses in the following accounts:

Repair and maintenance (XX-26-41)
Machinery repair (XX-26-40)
Equipment damaged (XX-26-48)
Dismantling retired property (XX-26-39)

1242.35 *Repair and maintenance (accounts XX-26-41).*

(a) *Where the carrier maintains records of the repairs by individual locomotive units or classes of locomotive units:*

(1) If individual locomotive units or classes of locomotive units are used exclusively in road-freight, road-passenger, yard-freight, or yard-passenger service, the separation shall be actual.

(2) If individual locomotive units or classes of locomotive units are used interchangeably (common) in road-freight (including train switching), road-passenger (including train switching), yard-freight or yard-passenger service, separate the heavy shop repairs between these services on the basis of run-out unit miles of individual locomotive units or classes of locomotive units since the previous shopping; and separate the cost of running repairs between such services on the basis of the miles run by the individual locomotive units or class of locomotive unit in each service during the accounting period for which the separation is being made.

(b) *Where the carrier maintains records of heavy shop repair costs by individual locomotive units or classes of locomotive units, but does not maintain records of the cost of running repairs by individual locomotive units:*

(1) The heavy shop repairs shall be separated as indicated in (a) above.

(2) The common expenses of running repairs shall be separated among road-freight (including train switching), road-passenger (including train switching), yard-freight and yard-passenger services on the basis of locomotive unit miles or locomotive ton-miles for the accounting period for which the separation is being made.

(c) *Where the carrier does not maintain records of either heavy shop repairs or running repairs by individual locomotive units or classes of locomotive units:* The expenses shall be separated among road-freight service (including train switching), road-passenger service (including train switching), yard-freight, and yard-passenger services, on the basis of locomotive unit-miles or locomotive ton-miles for the accounting period for which the separation is being made.

1242.36 *Machinery repair and equipment damaged (accounts XX-26-40 and XX-26-48).*

Separate common expenses according to separation of common expenses in repair and maintenance (accounts XX-26-41).

1242.37 *Dismantling retired property and depreciation (accounts XX-26-39 and 62-26-00).*

Separate common expenses in each account in proportion to the separation of common repair and maintenance expenses associated with the particular common properties depreciated and/or dismantled.

1242.38 *Fringe benefits (account 12-26-00).*

Separate common expenses in proportion to the split of common salaries and wages in administration, locomotive repair and maintenance, machinery repair, equipment damaged, and dismantling retired road property (accounts 11-26-01, 11-26-41, 11-26-40, 11-26-48, and 11-26-39).

1242.39 *Lease rentals—debit and credit, other rents—debit and credit, and repairs billed to others (accounts 31-26-00, 32-26-00, 35-26-00, 36-26-00 and 40-26-98).*

Separate common debit expenses accounts in proportion to the assignment of solely related freight or passenger service in each individual debit account. If there are not solely related expenses or if the solely related expenses are assigned entirely to freight or passenger service, separate common debit expense accounts on the same percentage basis calculated for the separation of administration (accounts XX-26-01).

Separate all common credit expense accounts on the same percentages calculated for the separation of administration (accounts XX-26-01).

1242.40 *Joint facility rents—debit and credit, and joint facility—debit and credit (accounts 33-26-00, 34-26-00 and 38-26-00).*

Solely related freight and passenger debit expense accounts shall be assigned according to the use made of each facility by the reporting carrier, regardless of the use by other carriers. Common debit expenses shall be separated on the basis of the percentage separation of the solely related expenses; or if the solely related expenses are assigned entirely to freight or passenger service, separate common expenses on the same percentages calculated for the separation of administration (accounts XX-26-01).

Separate all common credit expense accounts on the same percentages calculated for the separation of administration (accounts XX-26-01).

1242.41 *Other and casualties and insurance (accounts XX-26-99 and 50-26-00).*

Separate common expenses on the basis of percentages calculated for the separation of administration (accounts XX-26-01).

FREIGHT CARS

1242.42 *Administration, repair and maintenance, machinery repair, equipment damaged, dismantling retired property, fringe benefits, other casualties and insurance, lease rentals, joint facility rents, other rents, depreciation, joint facility, repairs billed to others, and other (accounts XX-22-01, XX-22-42, XX-22-40, XX-22-48, XX-22-39, 12-22-00, 50-22-00, 31-22-00 to 38-22-00 inclusive, 62-22-00, 40-22-98 and XX-22-99).*

These accounts pertain solely to freight service and contain no common expenses for separation herein.

OTHER EQUIPMENT

1242.43 *Administration (accounts XX-27-01).*

Separate common expenses according to freight/passenger separation of the following accounts:

Passenger and other revenue equipment (XX-27-45)
Work and other nonrevenue equipment (XX-27-47)

1242.44 *Trucks, trailers, and containers (revenue service) and floating equipment (revenue service) (accounts XX-23-43 and XX-23-44).*

These accounts pertain solely to freight service and contain no common expenses for separation herein.

1242.45 *Passenger and other revenue equipment (accounts XX-27-45).*

Separate as particular facts suggest.

1242.46 *Computers and data processing equipment (accounts XX-27-46).*

If the sum of the direct freight and the direct passenger expenses is more than 50 percent of the total charges to this account for an accounting division, separate the common expenses on the basis of the directly assigned expenses in this account for the accounting division involved. If the sum of the direct freight and the direct passenger expenses does not aggregate 50 percent of the total charges for an accounting division, the common expenses shall be separated on the basis of a special test. If common expenses exist in an accounting division but the direct expenses are applicable to only one service, i.e., freight or passenger, the common expenses shall be separated on the basis of a special test. If the accounting is performed on a system basis rather than by accounting divisions, follow the intent of the above instructions.

1242.47 *Machinery (accounts XX-27-40).*

Separate common expenses on the basis of the freight/passenger separation of administration (accounts XX-27-01).

1242.48 *Work and other nonrevenue equipment (accounts XX-27-47).*

Separate common expenses according to distribution of common expenses in way and structures—administration—other (accounts XX-19-06).

1242.49 *Equipment damaged (accounts XX-27-48).*

Separate common expenses according to distribution of common expenses in machinery, passenger and other revenue equipment, computer and data processing equipment and work and other nonrevenue equipment accounts (accounts XX-27-40, XX-27-45, XX-27-46, and XX-27-47).

1242.50 *Fringe benefits (account 12-27-00).*

Separate common expenses in proportion to the percentage separation of common salaries and wages in administration (account 11-27-01).

1242.51 *Dismantling retired property and depreciation (accounts XX-27-39 and 62-27-00).*

Separate common expenses in proportion to the separation of common repair and maintenance expenses associated with the particular common property depreciated and/or dismantled.

1242.52 *Lease rentals—debit and credit, other rents—debit and credit, repairs billed to others—credit (accounts 31-27-00, 32-27-00, 35-27-00, 36-27-00, and 40-27-98).*

Separate common debit expense accounts in proportion to the separation of solely related (freight or passenger service) in each individual account. If there are no solely related expenses or if the solely related expenses are assignable entirely to freight or passenger service, separate common debit expense accounts on the same percentages calculated for the separation of administration (accounts XX-27-01).

Separate common credit expense accounts on the basis of the same percentages calculated for the separation of administration (accounts XX-27-01).

1242.53 *Joint facility rents—debit and credit and joint facility—debit and credit (accounts 33-27-00, 34-27-00, 37-27-00, and 38-27-00).*

Solely related freight and passenger service debit expense accounts shall be assigned according to the use made of each facility by the reporting carrier, regardless of the use made of the facility by other carriers. Common debit expense accounts shall be separated on the basis of the percentage separation of the solely related expenses in each individual account. If there are no solely related expenses or if the solely related expenses are assigned entirely to freight or passenger service, separate common expenses on the same percentages calculated for the separation of administration (accounts XX-27-01).

Separate all common credit expense accounts on the basis of the same percentages calculated for the separation of administration (accounts XX-27-01).

1242.54 *Other and casualties and insurance (accounts XX-27-99 and 50-27-00).*

Separate common expenses on the basis of the percentages calculated for the separation of administration (accounts XX-27-01).

OPERATING EXPENSES—TRANSPORTATION

TRAIN OPERATIONS

1242.55 *Administration (accounts XX-51-01).*

Separate common expenses according to distribution of common expenses in the following accounts

Engine crews (XX-51-56)
Train crews (XX-51-57)
Dispatching trains (XX-51-58)
Operating signals and interlockers (XX-51-59)
Operating drawbridges (XX-51-60)
Highway crossing protection (XX-51-61)
Train inspection and lubrication (XX-51-62)
Locomotive fuel (XX-51-67)
Electric power purchased/produced for motive power (XX-51-68)
Servicing locomotives (XX-51-69)
Clearing wrecks (XX-51-63)

1242.56 *Engine crews and trains crews (accounts XX-51-56 and XX-51-57).*

Separate common expenses on the basis of direct assignment or if there are no directly assignable expenses, separate on the basis of train hours, including train switching hours.

1242.57 *Dispatching trains (accounts XX-51-58).*

Separate common expenses on the basis of train hours, including train switching hours.

1242.58 *Operating signals and interlockers, operating drawbridges, highway crossing protection (accounts XX-51-59, XX-51-60 and XX-51-61).*

Separate common expenses on the basis of total train hours (including train switching hours) of the particular common operating divisions or track segment on which the common signals, interlockers, drawbridges and highway crossings are located.

1242.59 *Train inspection and lubrication (accounts XX-51-62).*

Separate common expenses on basis of directly assigned expenses. If there are no directly assignable expenses, separate on the basis of train-miles.

1242.60 *Locomotive fuel, electric power purchased/produced for motive power and servicing locomotives (accounts XX-51-67, XX-51-68 and XX-51-69).*

Separate common expenses in each account on basis of direct expenses. If there are no direct expenses, separate on the basis of train hours and way-switching service hours.

1242.61 *Freight lost or damaged—solely related (to train) (account 51-51-00).*

Separate common expenses on the basis of proportion of the solely related expenses assigned to freight and passenger services or on the basis of a special study.

1242.62 *Clearing wrecks (accounts XX-51-63).*

Separate common expenses according to specific circumstances.

1242.63 *Fringe benefits (account 12-51-00).*

Separate common expenses in proportion to the percentage separation calculated for the salaries and wages account—administration (account 11-51-01).

1242.64 *Joint facility—debit and credit (accounts 37-51-00 and 38-51-00).*

Solely related freight and passenger service debit expense accounts shall be assigned according to the use made of each facility by the reporting carrier, regardless of the use made of the facility by other carriers. Common debit expense accounts shall be separated on the basis of the percentage separation of the solely related expenses. If there are no solely related expenses or if the solely related expenses are assigned entirely to either freight or passenger service, separate common expenses on the same percentages calculated for the separation of administration (accounts XX-51-01).

Separate common credit expense accounts on the basis of the percentages calculated for the separation of administration (accounts XX-51-01).

1242.65 *Other and casualties and insurance (accounts XX-51-99 and 50-51-00).*

Separate common expenses on the basis of the percentages calculated for the separation of administration (accounts XX-51-01).

YARD OPERATIONS

1242.66 *Administration (accounts XX-52-01).*

Separate common expenses according to distribution of common expenses in the following accounts:

Switch crews (XX-52-64)
Controlling operations (XX-52-65)
Yard and terminal clerical (XX-52-66)
Operating switches, signals, retarders and humps (XX-52-59)
Locomotive fuel (XX-52-67)
Servicing locomotives (XX-52-69)
Electric power purchased/produced for motive power (XX-52-68)
Clearing wrecks (XX-52-63)

1242.67 *Switch crews; controlling operations; yard and terminal clerical; locomotive fuel; electric power purchased/produced for motive power; operating switches signals, retarders, and humps; and servicing locomotives (accounts XX-52-64, XX-52-65, XX-52-66, XX-52-59, XX-52-67, XX-52-68 and XX-52-69).*

Separate common expenses on the basis of the distribution of freight and passenger yard-switching hours in those yards common to both freight and passenger services.

1242.68 *Freight lost or damaged—solely related (to yard) (account 51-52-00).*

Separate common expenses on the basis of the solely related freight and passenger expenses or on the basis of a special study.

1242.69 *Clearing wrecks (accounts XX-52-63).*

Separate common expenses according to specific circumstances.

1242.70 *Fringe benefits (account 12-52-00).*

Separate common expenses in proportion to the percentage separation calculated for the salaries and wages administration account (account 11-52-01).

1242.71 *Joint facility—debit and credit (accounts 37-52-00 and 38-52-00).*

Solely related freight and passenger service debit expense accounts shall be assigned according to the use made of each facility by the reporting carriers, regardless of the use made of the facility by other carriers. Common debit expenses shall be separated on the basis of the percentage separation of the solely related expenses. If there are no solely related expenses or if the solely related expenses are assigned entirely to freight or passenger service, separate common expenses on the same percentages calculated for the separation of administration (accounts XX-52-01).

Separate common credit expense accounts on the basis of the percentages calculated for the separation of administration (accounts XX-51-01).

1242.72 *Other and casualties and insurance (accounts XX-52-99 and 50-52-00).*

Separate common expenses on the basis of the percentages calculated for the separation of administration (accounts XX-52-01).

TRAIN AND YARD OPERATIONS COMMON

1242.73 *Cleaning car interiors and freight lost and damaged—all other (accounts XX-53-70 and 51-53-00).*

Separate common expenses on basis of solely related freight and passenger expenses or special study.

1242.74 *Adjusting and transferring loads, and car loading devices and grain doors (accounts XX-33-71 and XX-33-72).*

These accounts pertain solely to freight service and contain no common expenses for separation herein.

1242.75 *Fringe benefits (account 12-53-00).*

Separate common expenses in proportion to the freight/passenger separation calculated for the salaries and wages—cleaning car interiors common account (account 11-53-70).

SPECIALIZED SERVICE OPERATIONS

1242.76 *Administration; pickup and delivery, marine line haul, and rail substitute service; loading, unloading and local marine; protective services; freight lost or damaged—solely related; fringe benefits; casualties and insurance; joint facility, and other (accounts XX-34-01, XX-34-73, XX-34-74, XX-34,75, 51-34-00, 12-34-00, 50-34-00, 37-34-00, 38-34-00 and XX-34-99).*

These accounts pertain solely to freight service and contain no common expenses for separation herein.

ADMINISTRATIVE SUPPORT OPERATIONS

1242.77 *Administration (account XX-55-01).*

Separate common expenses in the same proportion as common expenses are separated in employees performing clerical and accounting functions, communication systems operations and loss and damage claims processing (accounts XX-55-76, XX-55-77 and XX-55-78).

1242.78 *Employees performing clerical and accounting functions and loss and damage claims processing (accounts XX-55-76 and XX-55-78).*

If the sum of the direct freight and the direct passenger expenses is more than 50 percent of the total charges to this account for an accounting division, separate the common expenses on the basis of the directly assigned expenses in this account for the particular accounting division. If the sum of the direct freight and the direct passenger expenses does not aggregate 50 percent of the total charges for an accounting division, the common expenses shall be separated on the basis of special test. If common expenses exist in an accounting division but the direct expenses are applicable to only one service, i.e., freight or passenger, and even though the direct charges are over 50 percent of the total charges, the common expenses shall be separated on the basis of a special test. If the accounting is performed on a system basis rather than by accounting division, follow the intent of the above instructions.

1242.79 *Communication systems operations (account XX-55-77).*

Separate common expenses on basis of the percentages calculated for the separation of communication systems (accounts XX-19-20), section 1242.18.

1242.80 *Fringe benefits (account 12-55-00).*

Separate common expenses in proportion to the percentages separation calculated for the salaries and wages—administration account (account 11-55-01).

1242.81 *Joint facility—debit and credit (accounts 37-55-00 and 38-55-00).*

Solely related freight and passenger service debit expense accounts shall be assigned according to the use made of each facility by the reporting carriers, regardless of the use made of the facility by other carriers. Common debit expenses shall be separated on the basis of the percentage separation of the solely related expenses. If there are no solely related expenses or if the solely related expenses are assigned entirely to either freight or passenger service, separate common expenses on the same percentages calculated for the separation of administration (accounts XX-55-01).

Separate common credit expenses on the basis of the percentages calculated for the separation of administration (accounts XX-55-01).

1242.82 *Other and casualties and insurance (accounts XX-55-99 and 50-55-00).*

Separate common expenses on the basis of the percentages calculated for the separation of administration (accounts XX-55-01).

OPERATING EXPENSES GENERAL AND ADMINISTRATION

1242.83 *Officers—general superintendence; accounting, auditing and finance; management services and data processing; personnel and labor relations; legal and secretarial; research and development; writedown of uncollectible accounts; property taxes; other taxes except on corporate income or payrolls; and other (accounts XX-63-01, XX-63-86, XX-63-87, XX-63-91, XX-63-92, XX-63-94, 63-63-00, 64-63-00, 65-63-00 and XX-63-99).*

Separate common expenses in proportion to the separation of all other common expenses except general and administrative expenses.

1242.84 *Marketing, sales, and public relations and advertising (accounts XX-63-88, XX-63-89 and XX-63-93).*

Separate each common expense account on the basis of the solely related freight and passenger expense accounts.

1242.85 *Fringe benefits (account 12-63-00).*

Separate the common expenses in proportion to the total common salaries and wages expense separation (accounts 11-XX-XX) determined in sections 1242.83 and 1242.84.

1242.86 *Industrial development (accounts XX-61-90).*

These accounts pertain solely to freight service and contain no common expenses for separation herein.

1242.87 *Joint facility—debit and credit and casualties and insurance (accounts 37-63-00, 38-63-00 and 50-63-00).*

Separate the common expenses in proportion to the total of all common expense separations determined in sections 1242.83 and 1242.84 above.

NOTE: If compilation of the data in compliance with any of the above separation rules results in an undue burden in accounting expense, the carrier may request relief from such rules by letter to the Director, Bureau of Accounts. If reliable data can be developed through other methods and procedures, the carrier may request substitution of such methods also by letter to the Director, Bureau of Accounts. In both cases, the carrier shall support the request with full details.

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EX PARTE NO. 137

CONTRACTS FOR PROTECTIVE SERVICES

Decided July 27, 1978

Upon remand from the United States District Court for the District of Columbia various settlement conferences have been held and all parties have reached settlement. On the substantive issues, the lack of further administrative actions, section 15(6) of the Interstate Commerce Act, and equitable considerations do not bar past liability. Plaintiff carriers can be held liable from June 10, 1963, for their previous noncompliance with our report and order of 318 I.C.C. 111 (1962).

Appearances as shown in prior reports.

DECISION

BY THE COMMISSION:

This proceeding is before the Commission on remand from the three-judge District Court in *Southern Ry. Co.* v. *United States,* 412 F. Supp. 1122 (D.C. 1976). The action was brought by several railroads against the United States and the Interstate Commerce Commission for the purpose of enjoining, annulling and setting aside the 1962 report and order of the Commission in Ex Parte No. 137, *Contracts for Protective Services,* 318 I.C.C. 111 (1962). The court held the 1962 order to be valid and enforceable for the future. 412 F. Supp. at 1128. As to the past, however, the court held that there were problems of possible illegality and unfairness for holding carriers liable for their noncompliance with the 1962 order. The court, on remand, gave the Commission two tasks: first, "to determine whether, and as of what point, plaintiffs (carriers) can be held liable for their previous non-compliance" *Id.* Secondly, the Commission was urged to hold a settlement conference among all interested parties in order to terminate pending litigation. *Id.* Moreover, the court made clear that it would not enjoin enforcement of the 1962 order pending the outcome of these proceedings on remand. *Id.*

The Commission has followed this two-tier method in dealing with this controversy. In response to the court's remand, we issued our interim report and order of the commission on remand at 356 I.C.C. 95 (1976). That interim report set up the first settlement conference and listed a number of possible cutoff dates for past liability and other issues for interested parties to comment upon. We also issued a report in this proceeding at 353 I.C.C. 812 (1977), which involved nearly all the parties herein. A total of five settlement or informal conferences were held on September 21, 1976, October 14, 1976, December 16, 1976, February 9, 1977, and February 1, 1978. The last conference only indirectly involved Pacific Fruit Express (PFE). On December 27, 1977, the Rock Island, the last major carrier not to have settled, informed the Commission that it has reached settlement with PFE and it submitted a contract with PFE for Commission approval. This contract was approved on February 27, 1978. All parties have now settled with PFE.

Thus, the court's first task, to determine whether, and as of what point, the parties are liable, is moot since the parties have reached settlement. However, in order to answer the issue the court has raised and since the same issue is before the Commission on referral from the United States District Court for the Eastern District of Pennsylvania in ***Atchison, T. & S. F. Ry. Co.*** v. ***Baltimore & O. R. Co.***, civil action No. 74-1859 (E.D. Pa. 1976), we will make a determination on what we believe to be the proper cutoff date for past liability, absent agreement of the parties.

I. Background and Prior Proceedings

In 1940 Congress enacted section 1(14)(b) of the Interstate Commerce Act which, as here pertinent, provides as follows:

> It shall be unlawful for any common carrier by railroad or express company, subject to this part, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier *** of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier *** to continue *** as a party to any such contract ***unless such contract *** has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest: ***.

Protective services are special services for the protection of perishable commodities from the elements while moving in transit. Mechanical protective services (MPS), is protection furnished the lading by or through the operation of a mechanical unit in a car so equipped. Prior to the advent of mechanical protective units in 1953, protective services involved the use of ice or salt in refrigeration cars. The carline loaded the car with ice or salt but it was replenished by each carrier en route. The Commission ruled that this did not constitute "protective services" under section 1(14)(b).

See *Contracts for Protective Services,* 241 I.C.C. 145, 160 (1941). With the advent of mechanical units, however, it was possible for the originating line to render its service off-line without the need of extensive services in intermediate and destination areas. To compensate the carlines under these new conditions, the National Perishable Freight Committee adopted division sheet 7 in 1953. Under its provisions, 80 percent of the revenue collected by the railroads under their respective tariffs for mechanical service are paid by the participating railroads to the railroad initially handling the shipment which percentage is in turn paid over to the carline for the mechanical protective units in its cars. The remaining 20 percent of the tariff revenue is divided among all railroads participating in the particular shipment.

The advent of MPS prompted the Commission to institute an investigation to determine whether the chargesfor the use of MPS units were just, reasonable, and consistent with the public interest. Thereupon, in our report of 318 I.C.C. 111 (1962) *supra,* we found that the charges for MPS did not yield the cost of rendering such services, 318 I.C.C. at 123. The Commission directed that "[a]ll rail carriers and express companies receiving protective services under any contracts, agreements, or arrangements requiring approval under section 1(14)(b) of the Interstate Commerce Act shall submit for approval within 120 days after the effective date of the order herein, new or superseding contracts covering protective services which shall replace all prior contracts, including division sheet 7." *Id. at* 125. We also required that these new or superseding contracts contain certain specific requirements, including a guarantee of cost plus a maximum profit of 6 percent to the carlines. *Id.* at 125-127. Subsequently, the Commission extended the effective date of the 1962 order to June 10, 1963.

There were other administrative and court actions after the 1962 order which bear on the issues on remand. On March 12, 1963, after the date had expired for seeking reconsideration, the Missouri Pacific and the Wabash, owning lines of American Refrigerator Transit Company (ART), filed a "petition for leave to file a petition for clarification and/or modification." The petition was denied. On September 9, 1963, the Commission approved a number of contracts, some "unconditionally", as being in compliance with the 1962 order. 321 I.C.C. 758 (1963).

In 1965 PFE brought an action in the Northern District of California for damages and injunctive relief against 90 railroads for compensation due for providing MPS. The Commission intervened as a party plaintiff. The District Judge in California referred certain questions to the Commission which were answered in our declaratory order, applicable only to the California action, in *Contracts—Pacific Fruit Exp. Co. & Akron, C. & Y. R. Co.*, 340 I.C.C. 754 (1972).[1] The 1972 order declared that all, not just originating carriers, are required to file MPS contracts with PFE; that the furnishing of mechanical refrigerator cars constituted "protective service" under section 1(14)(b) of the Interstate Commerce Act; and that division sheet 7, although it had not previously been filed with and approved by the Commission, was specifically embraced and disapproved as a method for settlement of protective service accounts by the 1962 order.

On December 1, 1972, various carriers filed a "petition for further and supplemental hearings" charging that the 1972 report was at variance with our interpretations in the Ex Parte No. 137 proceeding. The petition was denied.

On March 2, 1973, the California District Court issued its decision in *Pacific Fruit Exp. Co.* v. *Akron, Canton & Youngstown R. Co.*, 355 F. Supp. 701 (N.D. Calif. 1973), affirmed 524 F. 2d 1025 (9th Cir. 1975), cert. denied 424 U.S. 911 (1976). The court found that the defendant railroads had failed and refused since 1962 to comply with the Commission's 1962 order since they did not enter into or submit to the Commission on or before 120 days after the effective date of the order new or superseding contracts. Thus, the court found that PFE was entitled to a judgment in its favor on the issue of liability of the defendants to it for damages incurred since January 1, 1964—basically the difference between the amount PFE had been paid under division sheet 7 and the amount it would have received if the defendants had complied with the 1962 order—together with interest, attorneys' fees and cost of suit.

The court also granted summary judgment to PFE and the Commission on the claim of injunctive relief. It enjoined the defendant railroads from continuing to fail, neglect or refuse to comply with the 1962 order. It ordered the defendant railroads to enter into good faith negotiations with PFE within 60 days and enter, within that period, into new, superseding contracts with PFE to be effective January 1, 1973, and to conform with our 1962 order. The Ninth Circuit Court of Appeals upheld the district court on the issue of the injunction (the district court had set up a separate proceeding to determine the exact amount of damages). Our report in this proceeding at 353 I.C.C. 812, metioned above, was part of the effort to enforce the court's injunction.

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[1] In our interim report, we noted that the southern court had upheld the 1962 order as so interpreted in 1972. 412 F. Supp. at 1128. Accordingly, we expressly incorporated the 1972 order as having general applicability in Ex Parte No. 137 as an interpretative ruling on the 1962 order. 356 I.C.C. at 97.

II. The Court Decision

As noted above, the court saw no legal obstacle that warranted enjoining the prospective application of the 1962 order. It also ruled that the 1962 order satisfied legal requirements and it could have been applied contemporaneously with its issuance to require that division sheet 7 be superseded by new agreements which would be filed for approval under section 1(14)(b). 412 F. Supp. at 1143. The court, however, was troubled by the carrier's exposure to liability for failure to file agreements superseding division sheet 7 by the date the Commission eventually set, June 10, 1963. It felt that the lack of clarity in the 1962 order, standing alone, would not bar the carrier's liability had the Commission been more explicit and decisive on the carrier's obligation to supersede division sheet 7. Instead, the Commission contributed to the problem by its denial of the 1963 ART "petition for clarification and/or modification," by unconditionally approving contracts soon afterwards which did not provide compensation from nonoriginating lines for the furnishing MPS, and by its denial in 1973 of the "petition for further and supplemental hearings." The court added that equitable considerations and decisions in ***Brimstone Railroad and Canal Co.*** v. ***United States,*** 276 U.S. 104 (1928) and ***Baltimore & Ohio R. Co.*** v. ***Alabama Great Southern R. Co.,*** 506 F. 2d 1265 (D.C. Cir. 1974), may bar past liability for previous noncompliance with the 1962 order. In light of these considerations, the Commission is to determine whether under the terms of the 1962 order carriers failing to file agreements superseding division sheet 7 can be held liable for the period between June 10, 1963 or some subsequent date. 412 F. Supp. at 1143-1147.

III. Whether Carriers Liable for Past Noncompliance

We must first determine whether the plaintiff carriers can be held liable for their previous noncompliance with the 1962 order. If the answer to this threshold question is affirmative, then we can decide the issue of from what point they are so liable.

In statement filed by 24 railroads, it is argued that there is no past liability since: (1) both the 1962 and 1972 orders contemplated further administrative action before liability would arise, (2) the principles set out in section 15(6) of the Interstate Commerce Act and the *Brimstone* and *Baltimore & Ohio* decisions bar liability; and (3) independently of the 1962 and 1972 orders and the *Brimstone* doctrine, liability is barred by equitable considerations.

In the discussion that follows, we shall discuss each of these issues. In doing so, we find that we disagree with the railroads' arguments and that the plaintiff carriers can be held liable for their past noncompliance.

(a) *Further administrative action.*—In a statement by the railroads it is argued that there should first be a determination that there is no liability for damages because both the 1962 order and the 1972 order contemplated further administrative action before penalties or liability would arise. The 1962 order provided that carriers "shall submit for approval within 120 days *** new and superseding contracts covering protective services which shall replace all prior contracts, including division sheet 7." 318 I.C.C. at 125. The railroads argue, however, that the 1962 order did not contemplate automatic liability or penalties for failure to file the superseding contracts. Instead, it stated that if such new contracts were not filed "*further consideration* will be given to the issuance of an order finding the presently unapproved contracts not within the requirements of section 1(14)(b)." [Emphasis added.] 318 I.C.C. at 127. The railroads further argue that the 1972 order did not modify the declaration in the 1962 order that further administrative steps had to be taken prior to the imposition of liability for noncompliance. The 1972 order stated that the 1962 order "does not confer substantive rights upon the protective service companies to recover losses; that right must, if at all, arise from the contracts required by the Commission's order or by other means." 340 I.C.C. at 769. Thus, the railroads contend they are not liable since the Commission has opened no administrative enforcement proceedings of any kind to disapprove actions taken thus far by the carriers.

We must reject this argument of the railroads. The carriers had an affirmative duty to submit protection service contracts to the Commission which complied with the regulations promulgated in the 1962 order. When they failed to do so, PFE exercised its right under section 9 of the act to sue for damages in district court. It did not come to the Commission first. The Commission could have issued an order for the failure to file new and superseding contracts, but in the absence of such a request from the carlines prior to the filing of the court action, we did not. We do not consider such an order to be necessary before a violation of the MPS regulations could be found. Under section 16(7) of the act, all common carriers are required "to observe and comply with such orders so long as the same shall remain in effect." Under section 8 of the act, if any common carrier shall do or cause to be done anything which the act prohibits, then "such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation ***." Section 9 allows the injured party to bring the action for damages either in the Commission or in the district courts.

The 1972 order does not support the railroad's argument that further administrative enforcement proceedings were a condition precedent to the existence of substantive rights under the 1962 order. The railroads point to language in the 1972 order (340 I.C.C. at 769) for the proposition that the 1962 order does not confer substantive rights upon protective service companies to recover losses; that right must, if at all, arise from the contracts required by the Commission's order or by other means. The Commission, however, was referring to the fact that "the order itself does not constitute a contract between the parties." *Id.* Thus, as noted by the California District Court an action could not be brought using the Commission's 1962 order as a contract between the parties, it must instead be based on any contracts which the parties may have entered into or "by other means." Such other means refers to action taken under either section 16(12) for injunctive relief and sections 8 and 9 for damage relief. 355 F. Supp. at 707.

We also stated in our 1972 order that the carriers' failure to comply with the 1962 order subjects them to enforcement action by the Commission. "Enforcement action" does not mean administrative enforcement action within the Commission, but rather enforcement action within the courts. The Commission took this course by intervening in PFE's California District Court suit as a party plaintiff.

We believe our actions have been consistent with our 1962 order, and the fact that more aggressive action was not taken should not be deemed to render that order ineffective. The carlines should not be deprived of their rights to damages because of the lack of further administrative actions. As the Ninth Circuit Court of Appeals stated regarding the carlines right to injunctive relief but in language which is also applicable to their substantive right to other relief:

> There is no substance to appellants' contention that showhow PFE had no substantive right enforceable in the District Court by reason of the 1962 order of ICC and that hence no right to injunctive relief was obtainable under §16(12) of the Act. The contention appears to be that the 1962 order conferred no substantive right on PFE for the direct payment of money, which is correct. But that is not to say that the right under the order to have the railroads enter into contract negotiations, a result of which would provide perhaps for more favorable rights to obtain money, is not in itself a substantive right subject to enforcement in the District Court under §16(12) of the Act. The very ground of the complaint to which the 1962 order addressed itself was the refusal of the railroads to do that which they should have done, to wit, enter into new contracts, the consequences of which would have been to provide for the payment of money by the railroads to PFE. Clearly, the deprivation of the right to a contract which the order compelled was sufficient in itself to be regarded as a "substantive right." [*Pacific Fruit Express Co.* v. *Akron, C. & Y. Co.*, 524 F. 2d 1025, 1030 (9th Cir. 1975).]

(b) *Section 15(6) bar to liability.*—The railroads argue that even if the Commission were not precluded by its own interpretations of the 1962 order from imposing liability for past noncompliance, retroactive liability is barred by the principles set out in section 15(6) of the Interstate Commerce Act, as interpreted in *Brimstone R.R.* v. *United States*, 276 U.S. 104 (1928), and *Baltimore and Ohio R.R.* v. *Alabama Great Southern R.R.*, 506 F. 2d 1265 (D.C. Cir. 1974).

The court stated that it had difficulty with the imposition of liability for past noncompliance because under *Brimstone* the Commission is barred by section 15(6) of the act from requiring readjustments between carriers of past receipts from past agreed rates, as opposed to readjustments of past receipts from particular joint rates which have been specifically established by the Commission. For agreed rates, the Commission can only order a prospective change of divisions; if the joint rates were established by Commission order, then the change of divisions may be effective as of the date of the filing of the complaint or the date of Commission order of investigation. The court also noted that while *Brimstone* and section 15(6) deal only with the Commission's power, *Baltimore & Ohio* found the *Brimstone* analysis controlling on the court's equitable power to award retroactive relief from allegedly unreasonable agreed to divisions maintained during the pendency of the administrative proceeding. 412 F. Supp. at 1144-45.

The court recognized that *Brimstone* may not expressly govern this issue since section 15(6) deals with the readjustment of past receipts between carriers and does not deal with the rights of carlines against carriers. It also recognized that the Commission is acting under section 1(14)(b) to regulate compensation to carline companies for the interline provision of MPS, and only indirectly to affect the intercarrier division of protective service tariff revenues. The court, however, felt that in most instances the carline is simply an adjunct of the parent carrier. This case represents for the court a tension between sections 15(6) and 1(14)(b); it is the court's "sense" that the distinctions between *Brimstone* and this case do not negate the pertinency of principle underlying the *Brimstone* decision. *Id.*

The 24 railroads believe that *Brimstone* is applicable. They first of all argue that the carlines are in fact "an adjunct" of the parent carriers, as noted by the court. They take exception to protestations to the contrary by the carlines. PFE, for instance, stated that it has been in operation since 1906; it has no common directors with its parents; it has thousands of employees; and it is an enterprise separate and apart from the railroad business conducted by its parents. ART notes that the rail parent of a given carline often does not participate in the movement of the carline's MPS unit. The railroads, on the other hand, argue that the proceedings culminating in the 1962 order show the bearing the railroad control of carlines has on the historical use of a division sheet to govern joint-rates. They state that division sheet 7 was issued by the National Perishable Freight Committee (NPFC), which was made up of officers of railroads or carlines. They argue that carline representatives raised no objection to the 80-20 division in 1953, or later. In short, the division sheet is analagous to a joint tariff or rate which comes directly under the coverage of section 15(6) and to which the principles of that section and of *Brimstone* and *Baltimore & Ohio* apply. Thus, the agreed division cannot be changed retroactively.

Finally, the railroads contend that the carlines are trying to have it both ways: they are not "an adjunct" of their parents for section 1(14)(b) purposes but they would assert their relationship with their parents to receive time-mileage charges under section 1(14)(a).

We believe that the carriers can be held liable for past damages. We find that section 15(6) and *Brimstone* and *Baltimore & Ohio* are applicable in this case. We believe that section 15(6) should be strictly construed in light not only of section 1(14)(b) but also of sections 8 and 9 of the act.

This controversy is not between carriers and does not involve divisions. Although there is some affinity between the carlines and their parents, they are separate entities. Indeed carlines do not appear as common carriers under section 1(3)(a) of the act. As the court noted, the Commission sought enactment of section 1(14)(b) because of doubts as to our jurisdiction over carline companies and because of our desire to supervise and control the relationship between carlines and common carriers by railroad.[2] And, the argument the carlines are having in both ways is amiss since sections 1(14)(a) and 1(14)(b) provide for that duality.

Only in the most indirect manner does this case involve divisions. A division is a share of the line-haul revenue received by a carrier taking part in that movement. This controversy involves the necessity of railroad-carline MPS contracts to be in compliance with section 1(14)(b) and the 1962 order. There is no attempt to alter divisions of freight rates or protective service charges. The 1962 order put all carriers on notice that the division sheet 7 arrangement did not comply with section 1(14)(b). Division sheet 7, as noted above, was an agreement between railroads participating in joint through rates to compensate the carlines by distributing to them a portion of their revenues. It was not a contract to which any carline is a party.

An action for adjustment of divisions is limited by the total revenue available from a particular movement of traffic. The system ordered by the Commission, pursuant to its authority under section 1(14)(b), is completely different. Beginning in 1941, immediately after enactment of section 1(14)(b), the Commission laid down the broad principles for governing contracts for protective services. Thus, in Ex Parte No. 137, *Contracts for Protective Services,* 246 I.C.C. 145 (1941), the Commission said:

> The car-line companies should bill each individual railroad for the services which it renders to it, on the basis of cost plus a reasonable profit. *Id. at* 155.

The entire Ex Parte No. 137 series of adjudications, beginning in 1941 and continuing to the present time, have been premised on the finding that the person performing protective service should receive "the cost of performing the service" (318 I.C.C. at 138). MPS contracts must provide for the payment of cost, not a share of a division. The suits of the carline companies are actions for the recovery of costs rather than a readjustment of past divisions.

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[2] During hearings before the Senate Committee on Interstate Commerce (76th Cong., 1st Sess., on S. 1310, S. 1869, S. 2009 and S. 2016, April 3 to 14, 1939, pp. 786-87 and 818, Senator Reed asked Commissioner Eastman during hearings on proposed legislation for his judgment of the desirability of adding "private car companies" following "express companies" under the definition of "common carrier." (See § 1 [3] [a].) Commissioner Eastman said in part, "I doubt whether they can properly be called common carriers, when all they do is furnish cars for railroad use." He later said, "It is not logical to include them under the definition of common carriers, because I doubt whether they are common carriers." Senator Reed agreed with Commissioner Eastman.

Thus, the court's statement, while being indirectly true, did not fully reflect the effect of changes in protective service charges: "[t]he effect of requiring changes for the benefit of foreign carlines in the allocations made under division sheet 7 is to prescribe for the benefit of car-owning carriers with MPS units a readjustment of the division of past receipts from agreed joint rates on perishable freight." 412 F. Supp. at 1145. A change in divisions affects the portion of revenues received by each carrier participating in an interline shipment. A change in protective service charges, however, does not effect a corresponding change in the share of revenues received by each participating carrier. The latter change may well affect the revenue received by the railroads owning carlines; but it may not affect the revenues received by the carriers transporting the perishable products. As noted by Fruit Growers Express (FGE), an FGE car may be used entirely by carriers who are not FGE owners; it will almost never be used for a shipment in which all owners participate. Section 15(6) is aimed at divisions of joint rates, fares, or charges; it does not, in our opinion, deal with the secondary divisions of revenues among parties not participating in "joint rates, fares or charges."

Thus, we believe that section 15(6) as interpreted by ***Brimstone*** and ***Baltimore & Ohio*** does not bar PFE's right to damages, nor does any other section of the act detract from a successful plaintiff's right to damages in an action brought under sections 8 and 9 of the act.

(c) ***Equitable consideration.***—The court raised the issue of whether equitable considerations bar the imposition of liability for past noncompliance. It stated that there was an element of unfairness in imposing liability when the parties are confused as to what is required of them and the Commission refuses to resolve doubts and by inaction and some affirmative conduct suggests that they are in compliance. The court added that liability may work considerable hardships for nonoriginating carriers who would be unable to offset their payments to carlines either through a retroactive readjustment of interline division of perishable freight rates or a retroactive increase in the rates charged shippers. Furthermore, the financial health of the railroads during this intervening period may have worsened considerably and without retroactive changes in rates and divisions some carriers may become insolvent. And the court stated that there is a composite of distortions that may pile up if private and agency actions result in a myriad of outcomes. 412 F. Supp. at 1143-1144.

The court noted, however, that the equities did not run solely with the receiving carriers. The carlines have been suffering losses in providing MPS during this period. PFE, which was unable to obtain agreements superseding division sheet 7, did not sit on its rights, and instituted its successful action before the California District Court and petitioned the Commission for a cease and desist order. The court finally noted that there is some warrant in the record for believing that the plaintiff carriers contributed in part to their present dilemma. When the Commission denied the 1963 "petition for clarification and/or modification", counsel wanting an answer to the issues now in dispute could then have made clear that only clarification was sought, for which the deadline for petitions for reconsideration would not have applied. 412 F. Supp. at 1144, footnote 64.

The railroads argue that independent of the Commission's 1962 order and the 1972 order and of the *Brimstone* doctrine, liability for past noncompliance with the 1962 order is barred by equitable considerations. They cite *Moss* v. *C.A.B.*, 521 F. 2d 298 (1975), which outlined two factors bearing on the equity of ordering retroactive payments: (1) the absence of a "fund of net enrichment from which restitution could appropriately be made," 521 F. 2d at 314, and (2) whether a willful violation of the statutory provisions was involved. *Id.* The railroads contend that there is no fund of net enrichment. The railroad industry has been operating in a deficit situation respecting MPS shipments and relief from this situation did not begin until our decision in Ex Parte No. 300 in 1975, where mechanical protective charge increases were found justified. Furthermore, the railroads allege that liability at this point would constitute a severe burden on a number of carriers already in poor financial straits.

Secondly, the railroads argue that, under the second equitable factor listed by the *Moss, supra,* court there was an absence of carrier willfulness in failing to negotiate contracts superseding division sheet 7. The carriers claim they were unaware of the impact of the 1962 order and its effects on their obligation to negotiate contracts superseding division sheet 7. Moreover, the Commission's refusal to grant the 1963 "petition for clarification and/or modification" and the 1972 "petition for further and supplemental hearings," coupled with the "unconditional approval" in September 1963 of contracts which made no attempt to supersede division sheet 7, created a situation in which the carriers justifiably relied on the continuing efficiency of the Commission-approved agreements and division sheet 7. The railroads noted that the court concluded that the Commission rebuffs to the 1963 and 1972 carrier petitions seeking clarification constituted an abuse of discretion on the part of the Commission. 412 F. Supp. at 1135. And, the Commission's "unconditional approval" in September 1963 of contracts which made no attempt to supersede division sheet 7 only added to the initial confusion. The railroads argue that the Commission cannot now penalize the carriers for a failure to act which the Commission itself induced. The railroads contend that they were not contumacious in failing to negotiate contracts superseding division sheet 7 because "the nature of the 1962 order was not clarified to any extent until the court in *Southern Ry.* rendered its decision."

The Commission's Bureau of Investigations and Enforcement (BIE) and the carlines view the equity issue differently. BIE charges that the carriers had an obligation to file division sheet 7 with the Commission which arose independently from section 1(14)(b) and the 1962 order. Had the carriers filed division sheet 7, it would have resulted in the rejection of that arrangement. The BIE finds disingenuous the assertion that able counsel representing all the Nation's railroads did not realize that they were required under either the clear language of the statute or the Commission's order to file division sheet 7. Thus, BIE claims it is inequitable that the carriers should profit from their own violation of failing to file division sheet 7.

The carlines claim that the extraordinary delay between the 1962 order and judicial review was due to the carriers. PFE charges the carriers with intentional and unreasonable delays in the enforcement action before the California District Court in all its stages. FGE finds it ironic that the parties that have caused the extraordinary time lapse are responsible for the growth in the size of the claims, and they now stand to benefit if their liability is reduced merely because of the passage of time. The railroads, on the other hand, deny that they have been dilatory in their conduct during this proceeding.

We do not need to decide whether the carriers were guilty of delaying a resolution of this proceeding. We find that in balancing the equities, the carlines are favored. We believe that the railroad's reliance on the *Moss* case is misplaced. To begin with, with regard to the two tests taken by the railroads from the *Moss* case, the court clearly stated that its conclusion was not dependent upon those tests. 521 F. 2d at 314. Furthermore, the court also limited its holding to situations "[w]here, as here, recovery can only be had in terms of restitution grounded in equitable considerations ***" *Id.* The PFE action in the California District Court for recovery of damages was not grounded solely in equity but it was a statutory cause of action for damages under 49 U.S.C. 8 for violation of provisions of the Interstate Commerce Act.

The railroads claim that there is no fund of net enrichment available since the carriers have carried on the MPS operations at a deficit. That situation, however, is largely of their own making since for the 15-year period between 1956 and 1971, the carriers did not seek any protective service rate increases before the Commission whatsoever. See *Mechanical Protective Serv. of Perishables—Nationwide,* 340 I.C.C. 470 (1972). From the carlines point of view, there should be a fund of net enrichment since the railroads failed to compensate PFE for its full costs and continued to receive 20 percent of the MPS tariff revenues.

The railroads contend that they were unaware of the impact of the 1962 order and its effects on their obligation to negotiate contracts superseding division sheet 7 citing the Commission's denial of the 1963 and 1972 petitions, which the court termed an abuse of discretion, and the unconditional approval of the 1963 contracts. With the benefit of hindsight, it might have been more helpful if the Commission had acted differently. The March 1963 "petition for clarification and/or modification" was filed after the date for petitions for reconsideration had expired. The court noted that counsel should have made clear that they were seeking only clarification, for which the deadline for reconsideration would not have applied. 412 F. Supp. at 1144 footnote 64. For the Commission to permit parties to seek reconsideration of its orders at anytime after the time for such petitions to be made, would add an element of instability to the transportation industry. The "unconditional approval" of contracts in 1963 involved contracts between the carriers and certain carlines. The contracts met the requirements of the Commission's 1962 order (they gave, for instance, the carlines their cost of performing service plus a reasonable profit not to exceed 6 percent) and were thus properly approved. While approving these acceptable contracts, the Commission failed to inform the carriers that they were violating their duty under the 1962 order. However, in the explicit language of the 1962 order, subsection (a), the Commission stated that all railroads shall superseded all prior contracts for protective services "including division sheet 7" (318 I.C.C. at 138). A granting of the 1973 "petition for further and supplemental hearings" which sought a reversal of the 1972 answers of the Commission to the interrogatories of the California court would have had the effect of reopening the Ex Parte No. 137 proceeding while the California court was reaching determinations based on the record in that proceeding. It could have been considered a derrogation of the court's jurisdiction. Further, the answers, contained in *Contracts—Pacific Fruit Exp. Co. & Akron, C. & Y. R. Co.,* 340 I.C.C. 754 (1972), were the result of interrogatories proposed by PFE and the plaintiffs in the *Southern Ry.* case. The parties did not seek a hearing before the Commission at the time the referral was made nor did they challenge the actions of the Commission before the California court.

All in all, the equities, in our opinion, favor the carlines. Since the advent of MPS in the 1950's, the railroads have consistently sought to justify their applications to the Commission for increases in MPS tariff charges by submitting cost evidence provided by PFE and other carlines as their costs. Yet, the railroads have refused to pay PFE these same costs that PFE has incurred. (See our decision in this proceeding at 353 I.C.C. 812 and 822.) Moreover, the carriers have failed to pay the carlines MPS charges at a level which the Commission has found to be fair and reasonable. Since 1962 the carlines have had to assume evermounting deficits. Considering that the carlines had no alternatives in furnishing MPS to the railroads, they will have been required to furnish such services at a loss if the railroads are to be relieved of liability.

In conclusion, we find to be without merit the arguments of the railroads that the lack of further administrative action, section 15(6), and equitable considerations bar past liability. We find that the carriers can be held liable for their previously noncompliance with the 1962 order.

IV. PROCEDURAL ISSUES

The railroads raise a number of procedural issues. They argue that to remedy defects in the 1962 order, in order to provide a basis for private damage actions, the Commission should open rulemaking proceedings on the record where all interested parties could be heard. The "petition for rulemaking and modification and clarification of rules" filed by certain eastern railroads should be handled in this proceeding on remand. Such a rulemaking would clarify such terms as "costs" and "proportionate service," provided for appropriate time limitation on liability, and state whether the 1962 order applies to protective service limits other than standard MPS units owned by carlines which are railroad subsidiaries. Those issues are outside the ambit of the court remand: "to determine whether, and as of what point, plaintiffs can be held liable for their previous noncompliance." A resolution of such issues can hopefully be achieved through negotiations between the carlines and the carriers. As we stated in our report on referral from the California court: "our consistent interpretation of the 1962 order has been that, within its relatively broad ambit, there is no single correct form of MPS contract." 353 I.C.C. at 817.

The railroads also argue that carriers not a party to either the 1962 or 1972 proceeding are not bound, absent further proceedings, by the decisions in those proceedings. We find this argument to be without merit. First of all, it should be noted that with the exception of ConRail, all carriers have been parties to either the 1962 or 1972 proceedings. Furthermore, the requirement that all carriers having any arrangement with any carline must file and receive Commission approval if such arrangement arises from section 1(14)(b) of the act and not the 1962 or 1972 orders. The 1962 order apprised all carriers, not just the parties to that proceeding, that division sheet 7 and all other arrangements would have to be replaced by new or superseding contracts. While the order requiring division sheet 7 to be superseded could not directly bind those carriers not a party to the 1962 proceedings, it put them on notice that they had a statutory duty to file their protective service arrangements and put them on further notice that the Commission would not find division sheet 7 acceptable as it existed.

Finally, the railroads argue that the 1972 ruling itself is of doubtful standing because it was adopted in a procedurally defective manner. We must also reject this argument. This is not the proper place nor time to make this assertion. As the Ninth Circuit held, any challenge to the 1972 order must have been made in the district court within 90 days of that order under 28 U.S.C. 1336 (b) and (c). 524 F. 2d at 1030.

V. DATE OF LIABILITY FOR PREVIOUS NONCOMPLIANCE

Since we find that the plaintiff carriers can be held liable for their previous noncompliance with the 1962 order, the Commission must determine "as of what point, plaintiffs can be held liable for their past noncompliance." Our interim report listed nine possible cutoff dates, 356 I.C.C. at 100-101. Only two dates received any support from the parties: April 6, 1976, the date of the *Southern Ry.* decision (by the railroads and Western Pacific) and June 10, 1963, the effective date of the 1962 order (from the remainder of the parties that addressed this issue).

Our previous discussion of whether the carriers can be held liable bears directly and is totally applicable to this issue. We find that the carriers are liable to PFE from the effective date of the 1962 order, June 10, 1963.[3] The explicit language of the 1962 order, subsection (a), stated that all railroads shall supersede all prior contracts for protective services "including division sheet 7." 318 I.C.C. at 138. The court noted that there was sufficient support for the implicit Commission finding "that division sheet 7 is an arrangement requiring approval under section 1(14)(b) whereby nonoriginating carriers provide compensation to foreign car lines for the provision of mechanical protective service." 412 F. Supp. at 1139. We find that further administrative actions were not contemplated by our 1962 and 1972 orders as condition precedents for carrier liability. We also find that section 15(6), as interpreted by ***Brimstone, supra,*** and ***Baltimore & Ohio, supra,*** do not bar retroactive liability. And, finally, in our opinion, the equities favor the carlines.

VICE CHAIRMAN CHRISTIAN, concurring in part and dissenting in part:

I am in agreement with the majority opinion except to the extent that it holds the carriers liable for damages for the period prior to February 28, 1972. In my opinion, the imposition of damages for noncompliance during the 10 years between the Commission's 1962 and 1972 orders is barred by equitable considerations.

The majority's conclusion that the equities favor the carlines for the entire post-1962 period is implicitly based upon the assumption that there was no rational excuse for the carriers' failure to comply immediately with the terms of the 1962 order. But I cannot overlook the fact that its failure to do so was at least partly the fault of the the contracts tendered pursuant to that order, there was no reason for the carriers to anticipate that they would ever have to pay a

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Essentially, the same finding was made in the California case wherein the court found that the carriers were liable to PFE for damages for failing to comply with the 1962 order from January 1, 1964. (355 F. Supp. at 708-09.) PFE had asked for the January 1, 1964 date instead of June 10, 1963, for accounting purposes.

Commission itself. The 1962 decision was not exactly a model of clarity on this issue, and the Commission expressly refused to clarify the order when requested to do so in 1963 by the Missouri Pacific and the Wabash in their petition for clarification and/or modification. Then, when noncomplying contracts were tendered for filing, they were accepted without criticism. As pointed out by the District of Columbia Court,

> *** the combination of failure to enforce after a considerable period of time and the sidestepping of opportunity for clarification has a bearing on the equity of reliance by the carriers, and of imposing liability for the period of inaction. The problem is that the Commission had identified its concern with Division Sheet 7 as an integral part of handling the problem of mechanical protective service in compliance with the intent of Congress, but by its post-1962 inaction and unwillingness to provide clarification intimated that plaintifffs had satisfied the requirements of the statute and order. [*Southern Ry. Co.* v. *United States,* 412 F. Supp. 1122, 1143 (D.D.C. 1976).]

The situation subsequent to the 1972 order is, however, entirely different. In that order, the Commission did in fact clarify its prior order, and thus eliminated the uncertainties that may have previously existed. Once the 1972 order had been issued, there could be no reasonable doubt on the part of the carriers as to what the Commission had intended by its prior 1962 decision, and at that point they had a clear obligation to comply. In these circumstances, I believe the equities clearly favor the carlines for the post-1972 period.

The Commission's own role in failing to resolve the confusion at an earlier time also causes me to disagree with the majority's analysis of the "fund of net enrichment" argument. I agree that the existence of such a fund is not a prerequisite to a finding of liability for past damages. However, its existence or nonexistence does bear upon a balancing of the equities. Here, the majority reasons that the absence of such a fund is the carriers' own fault (for not seeking rate increases), and that from the carlines point of view there "should be" a fund of net enrichment. I agree with this analysis insofar as it applies to the period subsequent to the 1972 clarifying order. Once they received the 1972 order, the carriers could not have been uncertain of their obligations and had a responsibility to take whatever action was required to enable them to meet those obligations—including, if necessary, a request for a rate increase. But this theory cannot reasonably be applied to the period between 1962 and 1972. There was at least some uncertainty as to the meaning of the 1962 order and, once the Commission had accepted greater sum to the car-hire companies—and thus no reason to seek a rate increase to cover that obligation. On this issue, again, I believe that a balancing of the equities leads to the conclusion that liability should be imposed only for the period subsequent to the 1972 order.

It is ordered:

This decision on remand shall be filed with the three-judge United States District Court, the Honorable Harold Leventhal, Circuit Judge, William B. Jones, District Judge, and June L. Green, District Judge, as a declaration and response to the order entered on April 6, 1976.

DECISION AND ORDER

No. W-C-29

PACIFIC TOWBOAT & SALVAGE CO.—INVESTIGATION OF OPERATIONS

Decided January 17, 1978

We have considered the investigation and the record in this proceeding, including the initial decision of the Administrative Law Judge, the exceptions filed by respondent, and the reply filed by the Commission's Bureau of Investigations and Enforcement.

The evidence of record shows that respondent transported components for a petroleum and natural gas processing facility consisting of one steel scrubber, one steel vessel, and one oil separator from California to Tacoma, Wash. At Tacoma, the items were "joined together" with other components and the completed units were transported to Prudhoe Bay by a carrier other than respondent. While we do not wholly subscribe to the Administrative Law Judge's reasoning, we believe that he correctly concluded that respondent may not lawfully render service at Tacoma. The evidence shows that the "joining together" of the involved articles at Tacoma change their character, utility, and value and therefore broke the continuity of the movement. As a result, the involved shipment was subject to the jurisdiction of the Commission, and since respondent does not hold the requisite authority to conduct operations at Tacoma, such operations are in violation of section 309(f) of the Interstate Commerce Act.

The Administrative Law Judge recommended that an order be entered requiring respondent to cease and desist from such unlawful operations unless appropriate authority is obtained. However, we do not believe that the issuance of a cease and desist order is an appropriate remedy. The subject transportation has long ceased and respondent has no intention of reviving the operation now or in the future. However, respondent is specifically reminded that the transportation performed herein by it from California to Tacoma, Wash., was unauthorized and it must seek appropriate authority from the Commission before instituting this type of operation in the future.

Except as noted above, the evidence considered in the light of the pleadings does not warrant a result different from that reached by the Administrative Law Judge. The statement of facts, conclusions, and findings in his initial decision are proper and correct in all material respect and are affirmed and adopted as our own.

It is ordered:

This investigation proceeding is discontinued.

The statement of facts, conclusions, and findings, decided June 15, 1977, of Administrative Law Judge Jerry F. Laughlin, follows:

Operations performed by respondent from California origins to Tacoma, Wash., found to be carriage as a contract carrier by water for which no authority held in violation of section 309(f) of the act. Cease and desist order entered.

Boris H. Lakusta for respondent.

Stephen Todd Rudman for the Bureau of Investigations and Enforcement, Interstate Commerce Commission.

This proceeding was instituted by the Commission's order dated June 9, 1976, in which the Commission on its own motion under section 304(e) of the act instituted an investigation concerning the water carrier operations of Pacific Towboat & Salvage Co. (PTS) with the view of determining whether said party has been and is engaging in the transportation of property in interstate or foreign commerce for compensation as a contract carrier by water in violation of section 309(f) of the act.

The proceeding was referred to the Administrative Law Judge for hearing and initial decision thereon. Hearing was held on February 28, 1977, at Los Angeles, Calif. The Bureau of Investigations and Enforcement of the Interstate Commerce Commission (Bureau) adduced evidence in opposition.

The facts in this case are not in dispute. PTS is a wholly owned subsidiary of a corporation in Hawaii with its offices located at Long Beach, Calif., holding no authority from this Commission. In the latter part of 1974 and the first part of 1975, PTS transported by water, certain large petroleum separaters, metal scrubbers, and various other steel vessels and tanks for storage of natural gas and petroleum products, from the San Francisco Bay, Calif., area or the Long Beach, Calif., area to Tacoma, Wash. The aforementioned items were transported for the Ralph M. Parsons Company (Parsons), a construction and engineering firm which has a contract with the

Atlantic Richfield Corporation (ARCO) to construct ARCO facilities for the processing of crude petroleum and natural gas at Prudhoe Bay, Alaska, which is located in the "north slope" oilfields. At Tacoma, the items transported were joined with other components of the facilities produced by Parsons at Tacoma, and the completed units were transported from Tacoma to Prudhoe Bay by a carrier other than PTS; the latter did not participate in the latter movement. In at least one instance, 5 months elapsed from the time that PTS transported the components from California to Tacoma and the time that the completed facility was transported to Prudhoe Bay. Upon arrival at Prudhoe Bay, the items were installed by Parsons as a complete facility. Upon being informed by the Interstate Commerce Commission that it was looking into the subject transportation, PTS immediately contacted representing counsel to determine the legality of such transportation; advice was received that no authority was required from the Commission. The transportation performed by PTS has now stopped and it has no intention of renewing this operation any time in the future. In fact, should the opportunity arise in the future to again commence this operation, PTS would first obtain a determination from the Commission if authority were required. It is the position of PTS that it desires to comply with whatever may be required by the law.

It is the contention of the Bureau that the subject transportation was performed by PTS as a contract carrier by water in interstate commerce between California points and Tacoma for compensation under contract to Parsons and, therefore, was subject to the Interstate Commerce Act; that in *Transit Privileges at Ranson, W. Va.*, 63 M.C.C. 660, 661 (1955) and *Gilliland Ext.—Storage in Transit, Grand Rapids, Mich.*, 53 M.C.C. 597 (1951), it was held that stopping a shipment at an intermediate point for processing constitutes two separate and distinct movements; that the decision in the cited cases above are supported by *Minnesota* v. *Blasius*, 290 U.S. 1 (1933), wherein the Supreme Court held that where a commodity's journey is interrupted to serve the purpose of its owner, and not to facilitate its continuing shipment or save it from the damages of a journey, that such property is not in continuous transit, and may be taxed by local authorities; and that the Commission should issue an order herein requiring PTS to cease and desist from all operations in interstate commerce as a contract carrier by water in violation of section 309(f) of the act unless and until appropriate authority is obtained from the Commission. It is further urged by the Bureau that despite the fact that the alleged unauthorized transportation by PTS has ceased, such cessation does not render a cease and desist order superfluous, since without it the operations could be resumed at any time, citing *Western Shippers Assn., Inc.—Investigation*, 88 M.C.C. 575, 577-78 (1962); that such a cease and desist order would be remedial in nature and not a penalty, citing *Farmers Feed & Supply Co.—Investigation of Operations*, 96 M.C.C. 409, 412-13 (1964); and that in *Collins, Ford, Longacre Patterson—Investigation*, 117 M.C.C. 628 (1972), the Commission held that while the violations in question were discontinued well in advance of the hearing in the proceeding, nevertheless the possibility exists that the practice could be instituted at some future time and the discontinuance did not make moot the issue of whether a cease and desist order should be entered.

Respondent, in disagreeing with the Bureau, takes the position that the subject transportation falls outside of the jurisdiction of the Commission by virtue of section 27(g) of the Alaska Statehood Act (48 U.S.C.A. Prac. 521), the "milling in transit" line of Commission authority, and the fact that the shipper's intent at all times was that the portions of transportation by PTS were to be transported to Alaska and, therefore, such transportation comes under the authority of the Federal Maritime Commission.

It is submitted that the shipper's and the carrier's intentions at all times was that the transportation in question was to be performed from California to Alaska and therefore the Alaska Statehood Act withheld from the Commission jurisdiction which occurred between California and Washington as well as that between Washington and Alaska; that the Commission has always held that the intent of the parties at the outset to unite all parts of the carriage is the most important single determination of continuous carriage and through billing, uninterrupted movement, continuous possession by the carrier, and unbroken bulk are not essential elements of a continuous move, but rather are merely incidents thereof, citing *Vernon Lbr. Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 279 I.C.C. 253, 257 (1950); that in *Brandeis, Goldschmidt & Co., Inc.*, v. *Chesapeake & O. Ry. Co.*, 274 I.C.C. 621, 626 (1949), it was stated: "Whether a shipment intrastate or interstate, local or through is determined by the intentions of the shipper together with the facts of shipment and not by the mere accidents or incidents of billing"; and that the intention of shipper herein is manifested by its correspondence to PTS as well as the purchase orders that the shipments involved the ARCO north slope gas project in Prudhoe Bay. Regarding its position of "milling in transit," PTS urges that under this doctine a break in the journey for the purpose of assembly or processing does not of itself mean that the continuous nature of the movement is broken; that where the essential character of the property transported is not altered, there is no purpose in viewing the stop as breaking the continuity of movement; that the joining of the California articles with others of a different kind at Tacoma, which did not materially change the articles, did not affect the continuity of movement as the character of the commodity remains essentially unchanged after its stop in Tacoma; and that in *Parkersburg Rig & Reel Co.* v. *Baltimore & O. R. Co.*, 109 I.C.C. 569 (1926), the Commission held that fabrication at an intermediate point did not destroy the continuity, and again in *Thomas Keery Co., Inc.*, v. *New York, O. & W. Ry. Co.*, 226 I.C.C. 335 (1938), the Commission concluded that the continuity of movement of methanol was not destroyed by the removal of water and waste oils by distillation at the transit point. It is further urged by respondent that the *Gilliland* and *Transit Privileges* cases, *supra*, relied upon by the Bureau in this proceeding involve situations different than that here; that in both of the above-cited cases the Commission said that since neither of these carriers was authorized to serve the alleged transit point, it would not be able to reach the question of whether a transit privilege should be recognized; and, that here the situation is different in that the question is whether the Commission jurisdiction attaches by virtue of a break in a continuous movement.

DISCUSSION AND CONCLUSIONS

The facts are clear that respondent did transport by water certain items for a named shipper from a California origin to Tacoma without there being in force at the time any authority held by respondent from the Commission. Respondent relies on the principle that such transportation does not come under the jurisdiction of the Commission because it was the intention of both shipper and respondent that this traffic was to move to Prudhoe Bay with the stop at Tacoma only for the purpose of "milling in transit." This position is untenable as respondent holds no authority of any kind to provide a service at Tacoma, and for whatever reason it delivered the involved items at that point, the fact remains, a carrier cannot afford service at a point not authorized. Had respondent held appropriate authority to serve Tacoma, then it would have been possible to entertain its arguments to justify the subject transportation without the presence of an appropriate permit. All things considered, the conclusion is compelled that respondent in performing the transportation in question did so in violation of section 309(f) of the act.

As noted, the subject transportation has long ceased and respondent has no intention of reviving this operation now or in the future, but an abundance of caution dictates that there is the ever possibility of the operations being resumed. Thus, a cease and desist order will be entered.

FINDINGS AND ORDER

Upon consideration of all evidence of record, the Administrative Law Judge finds that the subject transportation performed by respondent from California origins to Tacoma, Wash., was unauthorized and in violation of section 309(f) of the act, and that an order be entered requiring respondent to cease and desist forthwith and thereafter to refrain from such unauthorized operations.

The Administrative Law Judge further finds that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is the ORDER of the Administrative Law Judge, That in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereon;

It is further ordered, That respondent be, and it is hereby ordered and required to cease and desist and thereafter to refrain and abstain from operations, in interstate or foreign commerce, of the character found in said report to be unlawful, unless and until appropriate authority therefor is obtained.

SECTION 5b APPLICATION NO. 2[1]

WESTERN RAILROADS—AGREEMENT

Decided July 19, 1978

Approval of agreements between and among rail common carriers, respectively, of the Western Railroad Traffic Association, and committees associated therewith, The Southern Freight Association, and committees associated therewith, The Presidents Traffic Conference and The Traffic Executives Association-Eastern Railroads, and committees associated therewith, providing procedures for the joint consideration, initiation, or establishment of rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities or equipment), and rules pertaining thereto, applicable to transportatation, in interstate or foreign commerce, by railroad, between, to and from points in the western, southern, or eastern territory, denied. Proceeding held open for designated period to afford applicants an opportunity to submit additional evidence and revisions in conformity with the conclusions reached herein.

Andrew C. Armstrong, Harry D. Babcock, Richard J. Murphy, Charles C. Rettberg, Jr., and R. Curtis Steele, Jr., for Eastern Railroads.

Fred R. Birkholz and *Duncan B. Phillips* for Southern Railroads.

Joseph D. Feeney, Louis A. Harris, and *William C. Sizzle* for Western Railroads.

Karen S. Austin, W. Donald Boe, Jr., Martin L. Cassell, Barbara Davis, Donald E. Engie, William M. Gibbons, Louis A. Harris, Fritz R. Kahn, Richard T. Murphy, Donald E. Ransom, Michael E. Roper, W. A. Thie, and *Donal L. Turkal* for individual carriers.

R. Jeffrey Behm, Alfred F. Dougherty, Jr., Edmund B. Frost, Carl J. Lessing, Richard Malatt, Jerry A. Philpott, Robert W. Rosen, John F. Stephens, Jr., and *David I. Wilson* for the Federal Trade Commission.

Arthur B. Federman, Donald L. Flexner, David A. Lechie, Mark M. Levin, and *Joseph J. Saunders* for the United States Department of Justice.

Constance L. Abrams for the United States Department of Transportation.

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[1] This report also embraces Section 5b Application No. 3, Eastern Railroads—Agreement and Section 5b Application No. 6, Southern Railroads—Agreement.

Frank E. Polom for the Board of Trade of the city of Chicago.

Lee M. Rife for the Illinois Department of Agriculture.

W. H. Bassett, John F. Donelan, John E. Harvey, Charles E. Jackson, Christopher C. Janku, Paul G. McQuiston, and *Frederick L. Wood* for various shipper or carrier trade associations.

DECISION

BY THE COMMISSION:

These proceedings are before the entire Commission on appeal from separate initial decisions of an Administrative Law Judge. They are being consolidated for decision on appeal because they involve many similar issues, and the Commission's disposition of these common issues is applicable in each proceeding.

The basic question to be resolved on appeal is whether approval is warranted under section 5b of the Interstate Commerce Act of the separate proposed agreements among rail common carriers of the Western Railroad Traffic Association (Western Railroads), Traffic Executive Association-Eastern Railroads (Eastern Railroads) and the Southern Freight Association (Southern Railroads), collectively referred to as applicants, relating to the organization and procedures for joint consideration of rates and related matters. The initial decisions which were served concurrently on November 4, 1977, found that approval of the proposed agreements would be in furtherance of the national transportation policy when revised to reflect specified terms and conditions.

Separate administrative appeals to the initial decisions in all of the proceedings were filed by respective applicant railroads, the United States Department of Justice (DOJ), and the Federal Trade Commission (FTC). The Board of Trade of the city of Chicago and Archer Daniels Midland Company filed separate appeals to the initial decisions in the Western Railroads proceeding and Eastern Railroads proceeding. Administrative appeals to the initial decision in the Western Railroads proceeding were also filed by the Missouri-Kansas-Texas Railroad Company, St. Louis-San Francisco Railway Company and Seven Mountain Pacific and Canadian Railroads and other western lines (Seven Roads). Separate replies in each of the proceedings were filed by the respective railroad applicants, DOJ, FTC and the National Industrial Traffic League. Additional replies in the Western Railroads proceeding were filed by Seven Roads, William M. Gibbons, trustee of the property of the Chicago, Rock Island and Pacific Railroad Company, Debtor (CRIP), and the Denver and Rio Grande Western Railroad Company (D&RGW).

For the reasons set forth below, the finding of the Administrative Law Judge that the proposed agreement in each of the above proceedings has been shown to be in furtherance of the national transportation policy, is reversed. Applicants will be afforded an opportunity to submit additional evidence relating to the issue of whether approval of the proposed agreements would be in furtherance of the objectives of the national transportation policy. Our decision will also discuss other issues common to all three proceedings. Consideration of these other issues is not required in view of our resolution of the threshold issue stated above. However, in view of the detailed record before us on these matters, we elect to decide these issues at this time because of their importance for a proper understanding of the scope and effect of the newly enacted section 5b statute. Our decision will also provide guidance for the carriers in regard to any further amended agreements that may be filed. These issues include the following:

1. Meaning and scope of the "single-line rates" restriction.
2. Whether affiliated carriers should be treated as single carriers for the purposes of the single-line voting restriction.
3. Meaning of "practicably participate" with respect to voting and agreement on interline proposals.
4. Scope of permissible discussion of restricted proposals under section 5b.
5. Meaning of the broad tariff change exception.
6. Necessity for requiring rate bureaus to maintain verbatim transcripts of rate committee meetings, or open these meetings to the public.
7. Whether antitrust immunity under section 5b extends to the collective consideration of intrastate rates.

In addition, several issues relating solely to the Western Railroads agreement will be discussed separately.

The statement of facts as set forth in each decision of the Administrative Law Judge will be restated here only as necessary for a proper understanding of the issues. Exceptions and requested findings not discussed in this decision nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for a proper disposition of this proceeding.

Background of these proceedings.—Public Law 94-210, the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, (4R Act), amended section 5a of the Interstate Commerce Act, effective November 1, 1976, by deleting reference to railroads, and enacted a new section 5b governing railroad collective ratemaking agreements. Section 5b broadens the statutory prohibitions governing Commission approval of railroad ratemaking agreements. Under section 5b, the Commission is prohibited from approving any agreement which permits voting or agreement on single-line rates or charges, and on interline rates and charges by railroads who cannot practicably participate in the movement. Nor can agreements which permit joint action to protest or seek suspension of another railroad's rate or classification established by independent action be approved. However, the foregoing restrictions are not applicable to (1) general rate increases or decreases if the agreement accords the shipping public at least 15 days notice of such proposals and an opportunity to comment prior to tariff filing with the Commission, or (2) broad tariff changes.

Applicant railroads, in each of these proceedings, filed an application under section 5b. The proposed agreements are designed to supersede similar agreements previously approved under section 5a of the act, and to comply with the Commission's decision in ***Rate Bureau Investigation,*** 349 I.C.C. 811 (1975), affirmed and clarified in 351 I.C.C. 437 (1976). By order entered October 26, 1976, in Ex Parte No. 297 (Sub-No. 1), the Commission granted interim approval to each of the proposed agreements subject to specified terms and conditions, until such time as the agreements are processed by the Commission to final decision.

National transportation policy.—Under the standard of review as set forth in paragraph (2) of section 5b, the Commission is directed to approve collective ratemaking agreements among railroads if approval is not prohibited by the statute and would be in furtherance of the national transportation policy. Although section 5b differs from section 5a in that it contains additional prohibitions governing railroad agreements, the standard of review language is identical. Therefore the standard for determining whether approval of a proposed agreement would be in furtherance of the national transportation policy is the same under section 5b as under the section 5a statute. See ***Railroads Per Diem, Mileage, Demurrage—Agreement,*** 353 I.C.C. 673, 681 (1977).

In H. Rept. 1100 (80th Cong., 1st sess.) 13-14 (1947) the standard of review language of section 5a was explained as follows:

> Under the standard in the bill Congress entrusts to the Commission the task of applying to particular cases the general formula which Congress finds is determinative of the public interest, and directs the Commission to determine whether the advantages to the public interest through furtherance of the national transportation policy, are such as to outweigh the disadvantages to the public interest intended to be guarded against by the antitrust laws.

The Commission has previously interpreted the standard of review under paragraph (2) of section 5b to involve resolution of the following issues: (1) whether the proposed agreement would enhance one or more national transportation policy goals, (2) whether the advantages of the agreement override other considerations such as the anticompetitive nature of the agreement, and (3) whether the agreement is necessary or whether the objectives of the parties could be accomplished instead by some other means. See Section 5b Application No. 9, ***Lower Lakes Coal Demurrage—Agreement*** I.C.C. (1978). The foregoing language explains and clarifies the standard of review under which railroad collective ratemaking agreements had been considered under section 5a, namely, that Commission approval is necessary and warranted in light of national transportation policy objectives, and that these objectives cannot be accomplished by some other method than collective ratemaking.

Under section 5b, the Commission has primary jurisdiction to consider the value and necessity of railroad collective ratemaking agreements. However, the Commission must also weigh the anticompetitive effects of its approval. In our view, the section 5b exemption must be construed narrowly in favor of the benefits of competition. Consistent with this objective, the burden of establishing the necessity for Commission approval lies with the applicants seeking exemption from the operation of the antitrust laws. We turn now to a discussion of the evidentiary record in each of these proceedings.

Applicant Southern Railroads introduced no specific evidence demonstrating that Commission approval would be in furtherance of the national transportation policy. Southern Railroads maintain that they are not required to justify a complete grant of antitrust immunity in this proceeding. According to these applicants, the prior findings of the Commission in approving their collective ratemaking agreement under section 5a remain valid. Accordingly, Southern Railroads see their burden of proof as showing that their proposed amended agreement properly reflects the additional prohibitions of the 5b statute and the Commission's findings in ***Rate Bureau Investigation, supra.*** However, in ***Tidewater Coal Demurrage Agreement,*** 356 I.C.C. 66, 79 (1978), the Commission noted that "under section 5b the Commission may not approve agreements similar to those which the Commission approved in an earlier period under section 5a solely on the evidence submitted in those earlier proceedings without some evidence that transportation conditions as they relate to the agreement have not substantially changed."

As indicated by our decision in the *Tidewater* case, we intend to grant approval under section 5b only in those instances where applicants can demonstrate that approval is warranted on the basis of current transportation conditions. Southern Railroads' interpretation of their burden of proof in this proceeding is not consistent with stated Commission policy.

Similarly, the evidentiary presentation of the Eastern Railroads relies heavily on Commission approval under section 5a. These applicants recite the Commission's findings in the prior Eastern Railroads proceeding in support of the need for such approval under section 5b. They point out that, although the number of railroads has changed due to mergers and bankruptcies since 5a approval, the basic need for joint action still exists, namely, to enable applicants to comply with the requirements of the Interstate Commerce Act and to satisfy the objectives of the national transportation policy. The only specific evidence presented, however, was evidence advanced in the prior proceeding under section 5a concerning the number of carriers and routes involved on rail movements between New York and St. Louis. Applicants have not updated this example in the present section 5b proceeding.

Limited evidence relating to the necessity of Commission approval was presented by applicant Western Railroads. In support of the proposed Western Railroads agreement, the Western Railroads noted the interrelated nature of the railroad rate structure and alleged that the railroads in the West are both competitors and partners. Thus, concerted activities involving these railroads would violate the antitrust laws absent Commission approval of the proposed agreement under section 5b.

Applicants point to the need to interchange equipment and to exchange data to meet the needs of shippers as support for the proposed agreement. According to these applicants, no single road can develop sufficient information on its own to make an intelligent decision with respect to pricing and service. Regarding the need for collective ratemaking to avoid violations of the Interstate Commerce Act, the Western Railroads introduced several examples of past proposals considered collectively where potential violations of the act were avoided.

The approach adopted by the Western Railroads concerning their burden of proof on the national transportation policy issue is fundamentally correct but too limited in nature. These applicants have introduced certain evidence for the purpose of demonstrating the goals of the national transportation policy which would be enhanced by Commission approval of the proposed agreement, as well as the need for such approval because these objectives could not be achieved absent immunity from the antitrust laws.

The evidentiary presentation of the Western Railroads is deficient, however, in that it fails to justify approval of the proposed agreement to the full extent sought. Applicants' evidence on the national transportation policy issue was introduced by a representative of one member line, Burlington Northern. While the evidence of record may justify the need for approval within the territory served by the Burlington Northern, it does not support a finding that approval is warranted throughout the entire territory covered by the Western Railroads agreement.

The territorial scope of the Western Railroads agreement includes many other railroads and other significant market areas. In light of the express intent of the courts and this Commission to construe exemptions from the antitrust laws as narrowly as possible, applicants must affirmatively demonstrate that antitrust immunity is necessary to the full extent sought. A minimum evidentiary presentation by the Western Railroads should present specific examples of the need for Commission approval within each of the regional organizations which are part of the Western Railroads agreement proposed in Section 5b Application No. 2.

In view of the evidentiary deficiencies noted above, the Commission is unable to find that approval of the proposed agreements would be in furtherance of the national transportation policy or that the benefits of the agreements outweigh the disadvantages so that the parties to these agreements should be relieved from the operation of the antitrust laws.

We are aware that applicants did not fully understand their burden of proof concerning the national transportation policy issue. The *Tidewater* and *Lower Lakes* cases which defined applicants' burden of proof under section 5b were issued following the close of the evidentiary record in these proceedings. Accordingly, the Commission will withhold an order terminating the interim approval granted to these agreements for a specified period to afford applicants an opportunity to submit additional evidence regarding the issue of whether Commission approval of these agreements is necessary and warranted and would be in furtherance of the national transportation policy.

Applicants in these proceedings are required to submit evidence consistent with their burden of proof as set forth above. This evidence should be relevant to the issues outline in the *Lower Lakes* case, *supra.*

Applicants should be advised that the Commission will not accept general allegations of fact unsupported by evidence. General allegations that ratemaking agreements are necessary to further the objectives of the national transportation policy are not sufficient unless substantiated by facts which relate the statement to the agreement under consideration.

In addition applicants should specifically address the following question:

> Whether any of the goals which justify the collective ratemaking agreement under consideration can be accomplished by some method other than collective action?

Single-line rates.—In the initial decisions, the Administrative Law Judge found that proposals applicable to both single-line and joint-line movements must be separated for independent processing. The basis for that conclusion was an interpretation of the definition of a single-line rate contained in section 5b(5)(a). The agreements were ordered modified to discontinue inclusion of both single-line and joint-line movements in one proposal. Specifically, procedures whereby single-line proposals could be amended to include other single-line or joint-line movements were ordered eliminated.

Section 5b(5)(a) defines a single-line rate as:

> *one that is proposed by a single carrier applicable only over its own line and as to which the service *** can be performed by such carrier.* [Emphasis supplied.]

That section prohibits rate bureau voting on any single-line rate.

The heart of the controversy involves an interpretation of the italicized language in section 5b(5)(a). Applicants contend that all movements which will be subject to the rate contained in a proposal must be looked at collectively. As a single entity, the proposal is said not to be one proposed by a single carrier applicable only over its own line. It is argued that the proposal is applicable over the joint-line and single-line routes of all carriers participating in the proposal.

We agree with the Administrative Law Judge that this interpretation, contrary to the statutory provision, would permit voting on single-line rates. In our view, applicants' arguments are circuitous since single-line rates would be proposed by a single carrier for application over its own line absent collective ratemaking. The rate applied to a movement between two points on one carrier's line does not lose its identity as a single-line rate simply because it is included in a proposal applicable to other movements between the same two points on other carriers' lines. Consistent with section 5b(5)(a), that rate must be processed separate and apart from rates applicable to other single-line or joint-line movements.

Adoption of the interpretation offered by applicants would give little meaning to the section 5b(5)(a) voting restriction. Any carrier desirous of circumventing the restriction could simply include other movements in a single-line rate proposal. As proposed by the railroads, the only impact of the single-line voting restriction would be to preclude voting on rates which a single-line carrier intended to apply exclusively over its own line. We do not believe that Congress intended such a narrow contruction of section 5b(5)(a) nor that significant changes were necessary to protect the existing guarantees of independent action. Additionally, the exemptions created by section 5b(5)(a) to relax single-line voting prohibitions reinforce our belief that Congress intended to preclude collective action on individual rate adjustments affecting the traffic of a single carrier.

In *Rate Bureau Investigation, supra* at 850, we recognized that separate processing of single-line rates would encourage price competition between carriers. Thus, the prescribed interpretation is consistent with the rules of statutory construction which require that antitrust exemption statutes be interpreted narrowly as possible in favor of competition, see the *Tidewater* case, *supra.* It is also in keeping with the policy expressed in section 101(b) of the 4R Act to encourage competitive pricing practices within the railroad industry.

Affilated carriers under section 5b(5)(a).—As noted above, the Commission is prohibited from approving agreements which permit participation in agreements with respect to, or any voting on single-line rates, allowances, or charges established by any carrier. The immediate issue presented here involves the status of affiliated carriers under that section. The Administrative Law Judge concluded that affiliated carriers should not be treated as a single carrier for the purposes of this section because the section prohibited voting on single-line rates and charges established by *any carrier,* and carrier was defined in the legislation to mean any common carrier subject to part I. This conclusion was based on the failure of the 5b statute to provide specifically for the treatment of affiliates as one entity. The Administrative Law Judge reasoned that this silence impliedly sanctioned the treatment of affiliated carriers as individual carriers for ratemaking purposes.

Neither the act nor the legislative history of section 5b offers detailed guidance for the Commission in determining the status of affiliated carriers for the purposes of voting prohibitions under section 5b(5)(a), but a basic proposition and declaration of Congress, for our purposes here, in enacting the new legislation did emerge, namely, that rate bureau functions should be modernized and clarified in an effort to promote the use of competitive forces, wherever possible, in railroad pricing. We believe that purpose would be thwarted if we ignored the internal operations of affiliates and treated affiliated carriers as separate entities for collective ratemaking purposes. Many affiliated carriers operate the properties of the respective carriers under separate management, file separate tariffs with this Commission under section 6(1) and 6(4) of the act or hold themselves out to the shipping public as separate, individual operating entities. Nevertheless, they have certain common executive, operating, and traffic officers who establish or direct the policies of the entities. In such circumstances, we believe it would be difficult for a traffic policy to reflect the individual interests of the affiliated roads since it is highly unlikely in an interline proposal between affiliates that one carrier would make a traffic decision to the detriment of the other. Since their traffic policies will most likely be the same, it is our view that the interline proposals of affiliates should be treated as a single-line proposal rather than a joint-line proposal. Accordingly, where carriers under the same management and control propose, establish, or change rates, allowances, or charges between them, such proposals shall be single-line proposals for the purposes of the voting prohibitions of section 5b(5)(a). Carriers under common management and control, as used in this report, refers to carriers generally affiliated as that term is defined in section 5b(1)(a) to the extent of controlling traffic policy, even though separate corporate entities may be maintained. This finding is in harmony with a long list of cases in which lines under common control and management, though maintained as separate corporations, have been deemed single units for ratemaking purposes. See *Livestock To, From, And Between Points in the Southeast*, 91 I.C.C. 292, 295 (1924) and cases cited therein; *Columbia, Newberry, & Laurens R. Co.*, 117 I.C.C. 219 (1926); *Rates on Chert, Clay, Sand, and Gravel*, 197 I.C.C. 215, 233 (1933). Carriers which can demonstrate that the traffic policies of each entity are, in fact, separately and individually determined will be permitted to petition for relief from this finding.

Practicable participation.—The Administrative Law Judge ruled that a carrier can "practicably participate in a particular interline movement" if he "participates in a route as published in a tariff on file, or proposed to be filed, with the I.C.C. from an origin involved in the proposal to a destination involved in the proposal."

FTC challenges this definition as being overly broad, alleging that it would allow any carrier with a route between two points, no matter how circuitous and impractical, to agree and vote on proposals involving a certain commodity, even though it has never carried the commodity and has no intention of ever doing so. Carriers would be eligible to vote on proposals on the basis of a mere possibility of competition, rather than through actual competition and participation in the movement.

It is contended that such an interpretation would render the statutory prohibitions meaningless, and defeat the intent of Congress to ensure that interline rates are made competively.

FTC submits that a carrier should be considered as a "practicable participant" only if it either currently participates in the specified movement or has done so within the past 2 years. No other carrier would be permitted to agree or vote on the interline proposal. If a carrier wished to join in the movement of a new commodity, or one he had not previously handled, he would first gain a share of the market through rates established by independent action. If successful, he would then be a "practicable participant" for subsequent proposals.

We recently considered this issue in Section 5b Application No. 4, *Southern Ports Foreign Frt. Committee—Agreement,* 358 I.C.C. 696 (1978).[2] In that proceeding, a definition of "practicably participate" basically identical to the one proposed here by the Administrative Law Judge was found to be too broad because it did not require that the route relied on to prove participation be realistic or ever used by a shipper.

On the other hand, we found FTC's proposed definition to be too restrictive. Limiting carrier eligibility to agree or vote on interline proposals to current or recent participation in the "specified movement" eliminates collective consideration of proposals covering new traffic not previously handled by rail. It also disregards the statutory language (which reads "can practicably participate") by not recognizing that carriers who do not or have not carried a particular type of traffic may nevertheless be potential competitors and participants.

Petitions for reconsideration are presently pending.

In order to cure these deficiencies, we recommended that FTC's definition be modified to allow voting and agreement on proposals involving new traffic by all carriers who will handle the movement. This will allow voting and agreement by carriers who will participate in proposals involving: (1) traffic which has not moved by rail in the last 2 years; (2) commodities which will move for the first time from given origins because of construction of new manufacturing or production facilities; (3) commodities which will move for the first time by rail because of a line extension; and (4) new commodities named for the first time in the Uniform Freight Classification, for which commodity rates must be established.

In all other cases, agreement and voting on interline proposals was limited to those carriers who either currently handle the traffic as an origin, destination, or intermediate carrier, or have done so within the past 2 years.

We affirm the definition of "practicably participate" which is set forth in ***Southern Ports, supra.***

SCOPE OF PERMISSIBLE DISCUSSIONS OF SINGLE- AND JOINT-LINE RATE ISSUES

The Administrative Law Judge concluded that antitrust immunity accorded applicants under section 5b of the act could be extended to "discussions" of single- and joint-line proposals by all carrier members even though some of the members could not vote or agree on a proposal under section 5b(5)(a) of the act because a carrier was not a "practicable participant" in an interline proposal or because a proposal involved a single-line rate. He restricted the scope of permissible discussions to matters affecting the compensatory level of the proposed rate or rates, and matters relating to preference or prejudice of shippers or localities, section 4 departures, and the impact the proposal would have on the movement of traffic. Threats of retaliatory action were precluded from being within the scope of approved discussion. For the reasons stated below we believe "discussions" should be limited to issues under section 2, 3, and 4 of the Interstate Commerce Act.

Although the legislative history of section 5b(5)(a) shows that the prohibitions on "discussions" were subsequently excised from the final legislation, we cannot ignore the mandate of Congress that this Commission is to approve only those agreements which are drawn in accordance with the intent of Congress in enacting this particular section, namely, that single- and joint-line rates will be made competitively. In view of this express intent it is our belief that not all types of "discussions" were intended to be immunized from the operation of the antitrust laws. Collective ratemaking is permitted only to the extent that it is in furtherance of the national transportation policy. The public interest considerations underlying this policy are the public's right to rates that are not unjustly discriminatory, unduly preferential or prejudicial. Therefore, our assessment of the kinds of "discussions" that will be accorded immunity for the purposes of prosecution under Federal antitrust laws must be governed by what will further the public interest and also assure single- and joint-line rates will be made competitively.

In all three agreements, applicants have given examples of the types of comments which they deem permissible topics for discussion. Among them are issues concerning the compensatory levels of proposed rates, whether the proposals will result in discrimination, preference or prejudice, whether the proposal will adversely affect the movement of traffic, and whether a proposed rate will result in violations of the long- and short-haul provisions of the act.

We believe the compensatory level of proposals and the effect the proposal will have on the movement of traffic for these defined movements are something which should remain within the managerial perogatives of the initiating carrier in the case of single-line rates, and voting carriers in the case of interline proposals. We do not believe the public interest would be furthered by having these kinds of issues collectively discussed. In spite of the disclaimers in the proposed bylaws about express or implied agreements, "discussions" of these kinds of issues could interfere with, or have a "chilling effect" on making single- and joint-line rates competitively. In order to assure ourselves that such "discussions" will not result in an implied agreement, we decline to extend immunity to them. We believe, therefore, discussions by members relating to single-line or joint-line rates should be limited to potential violations of sections 2, 3, and 4 of the act.

Broad tariff change.—The Administrative Law Judge concluded that "broad tariff changes" as used in section 5b(5)(b)(ii) of the act should be defined in terms of geographical coverage. He found the applicants' proposed definition, which merely restated the language of the statute, to be inadequate and directed them to amend their agreement in accordance with the definition contained in the Western Railroad's agreement. This definition defines the territory over which the tariff changes are to be applicable.

DOJ also contends that this amended definition is deficient and would permit circumvention of section 5b's restrictions on rate bureau activity. The fact that "broad tariff changes" is coupled in the statute with "general rate increases" is presented as significant, mandating similar definitions for both terms. DOJ asserts that a "broad tariff change" is properly defined as a "general rate increase" which is limited to particular commodities—i. e., an adjustment in rates, charges or allowances which affect all of the movements of a commodity within a given territory or between two or more territories and which, like a general rate increase is mandated by increased costs which equally affect all carriers of the commodity.

We find nothing in the language of the statute or in the legislative history of section 5b which suggests that a "broad tariff change" must be limited to specific commodities or justified by increased costs. The mere fact that the term is listed in section 5b(5)(b)(ii) along with "general rate increases" provides no justification for DOJ's argument that it must be defined in the same way.

We agree with the Administrative Law Judge that the statute speaks in terms of geographical coverage and should, at least initially, be defined accordingly. Furthermore, we find that the definition prescribed in the initial decision meets our requirement that each of the terms of section 5b(5)(b)(ii) be fully and completely defined. See *Railroads Per Diem, Mileage, Demurrage—Agreement, supra.* A tariff change (other than a general increase or decrease) which is generally applicable to all carriers over a large and specifically defined territory adequately delineates those proposals which will be covered by the exception. Therefore, the finding of the Administrative Law Judge in each of these proceedings regarding the "broad tariff change" exception, is affirmed.

The DOJ is correct in noting that the broad tariff change language must be read so as to further the statutory purpose of the 4R Act to promote greater competition in the rail industry. The exception, if stretched too far, could be used to circumvent section 5b prohibitions against voting on single-line rates. This must not be allowed to happen. We will have greater confidence in translating these sentiments into a more specific definition after we have had some experience under the new agreements. The Administrative Law Judge noted, at sheet 37 of his initial decision in the Western Railroad agreement, as follows:

> It is, therefore, my belief that this definition is a reasonable and workable one and should be adopted for the purposes of this agreement. As particular situations arise,

possibly some of them may have to be handled on a case-by-case basis until a better definition can be formulated and included in the agreement.

This is a reasonable approach in the present situation. The carriers are put on notice that the "broad tariff change" exception will be subject to the rule of statutory construction which require that exemptions from the antitrust laws be interpreted as narrowly as possible in favor of competition; see Section 5b Application No. 10, *Tidewater Coal Demurrage Agreement, supra.*

Vebratim transcripts and open meetings.—The Administrative Law Judge, citing the Commission's decision in *Rate Bureau Investigation, supra,* found that verbatim transcripts of rate bureau meetings were unnecessary and would impose excessive and undue expense on the member carriers. Open meetings were also rejected on the grounds that public attendance would stifle free and open discussion of proposals and impede the ratemaking process. Furthermore, opening bureau meetings to the public in order to inhibit circumvention of section 5b's restrictions by carrier members was found to be an illegal delegation of the Commission's "exclusive" monitoring authority under section 5b(3) of the act.

In Section 5b Application No. 4, *Southern Ports Foreign Frt. Committee—Agreement, supra,* division 2 ruled that the findings of *Rate Bureau Investigation, supra,* must be modified where necessary to effectuate the subsequently enacted provisions of section 5b of the act. It was also noted that a requirement of verbatim transcripts might be necessary depending on the nature and scope of collective bureau handling of matters which are subject to the statutory restrictions on voting and agreement in section 5b(5)(a). Subequently, in Section 5b Application No. 8, *Railroads Per Diem* and *Mileage Rates—Agreement* (not printed), decided April 3, 1978, the Commission imposed a requirement for verbatim transcripts. Open meetings did not appear necessary since most of that ratemaking organization's activities are conducted on the basis of a written record.

Under the terms of the proposed agreements under consideration here, the applicants will collectively consider a large volume of "restricted" proposals. In addition, comment by carriers who are ineligible to vote or agree on these proposals is permitted. Close monitoring of the rate bureau meetings will be necessary, in these circumstances, to insure that the procompetitive aspects of section 5b are not circumvented. We recognize that the Commission does not have sufficient personnel to monitor every closed rate bureau meeting. Keeping formal minutes of the meeting will not provide an adequate safeguard since they are only summaries which fail to give the details of disucssion and voting. We are also aware that maintaining verbatim transcripts will result in a considerable expense for the member carriers. In our view, adequate monitoring can be achieved through opening all portions of rate committee meetings to the public, and by requiring the keeping of sound recordings of each meeting.

Complete tape recordings of the meetings will enable the Commission to perform its oversight responsbility without imposing inordinate expense on the bureaus. Furthermore, public scrutiny of the entire rate committee proceeding will provide an additional deterrent to illegal agreement and circumvention of the statute in those cases where Commission monitoring is limited. We cannot agree that this requirement results in an illegal delegation of our monitoring authority under section 5b(3) of the act. The Commission will continue to monitor rate bureau performance aggressively. By requiring open meetings, we are providing a reasonable safeguard against illegal activity in light of our present manpower limitations.

FTC and DOT will be allowed full access to the sound recordings of all meetings in performing their advisory role under section 5b(10) of the act. Without a first-hand view of bureau operation, they cannot effectively execute this statutory duty. In granting them access, we are neither illegally delegating our own responsibilities nor overstepping legal authority. Section 5b(a) allows us to approve rate bureau agreements "upon such terms and conditions" as we deem necessary. The conditions imposed are necessary and in furtherance of the national transportation policy.

Intrastate rates.—Section 1(2)(a) of the act specifies that part I shall not apply to transportation wholly within one State except as provided otherwise in that part of the act. Section 5b is included in part I of the act and contains no specific reference to intrastate transportation. Therefore, a plain reading of the statute indicates that this Commission cannot extend antitrust immunity to agreements concerning intrastate rates, and the Administrative Law Judge so concluded in his initial decisions.

Applicants contend that *Houston East and West Texas Ry. Co.* v. *United States*, 324 U.S. 342 (1914), the *Shreveport* case, authorizes our regulation of all intrastate transportation which affects interstate commerce. We agree that *Shreveport, supra,* sanctioned limited regulation under section 3 of the act to remove preferences and prejudices between interstate and intrastate commerce. However, that case does not support the position that Congress intended to extend the full scope of Federal jurisdiction to this Commission. Although the power delegated to Congress in the Commerce Clause[3] would reach any activity which could affect interstate commerce,[4] *Shreveport, supra,* clearly distinguished between that power and the authority delegated by Congress to the Commission in the Interstate Commerce Act. Our jurisdiction was carefully circumscribed to exclude application to transportation purely intrastate in nature.

Applicants contend that our jurisdiction to grant antitrust immunity to the extent sought can be implied from the pervasive regulatory scheme of the Interstate Commerce Act. It is also alleged that, by conditioning approval of section 5b agreements upon a finding that an agreement would further the national transportation policy, Congress authorized collective intrastate ratemaking to prevent publication of intrastate rates which contravene that policy by unduly burdening interstate commerce. However, our limited authority to regulate intrastate rates mandate rejection of these grounds for jurisdictional support.

Section 13(4) of the act empowers the Commission to adjust an intrastate rate only after it has been found to result in a discrimination against or burden on interstate commerce. Commission actions under this section of the act generally involve an upward adjustment of an intrastate rate to a level comparable to the corresponding interstate rate. Similarly, section 13(5) authorizes the Commission to establish intrastate rates if the rate has been proposed to a State agency for the purpose of adjusting it to a level equal to that of an interstate rate and the State agency does not act within 120 days. Congress clearly did not intend that this Commission regulate intrastate rates to the same extent as exercised over interstate rates. Most importantly, the act does not allow for regulation of intrastate rates which, although unreasonably high, do not unduly burden interstate commerce. We cannot allow competing carriers to agree jointly on the level of intrastate rates when we are without plenary authority to adjust those intrastate rates which are unreasonable but do not constitute a burden on interstate commerce.

Additional comment is in order with respect to applicants' contention that reference to the national transportation policy in section 5b(2) provides jurisdictional support for collective intrastate ratemaking for purposes of preventing publication of intrastate rates which unduly burden interstate commerce. From the record presented, we are unable to conclude that antitrust immunity would further any specific goals of the national transportation policy. Rate bureau consideration has not been shown to be either necessary or the least restrictive alternative available for the establishment of lawful intrastate rates. We see no reason why a carrier proposing an intrastate rate is incapable of determining itself whether that rate would unduly burden interstate commerce. It should also be noted that admininstrative convenience in intrastate ratemaking and tariff publication, which appears to be the principal justification for the relief sought, is not pertinent with respect to the question of whether antitrust immunity would further specific goals expressed in the national transportation policy.

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[3] U.S. Const., Art. I, §8.

[4] See *Wickard v. Filburn,* 317 U.S. 111 (1942).

Western agreement issues.—The following issues are peculiar to the Transcontinental Freight Bureau (TCFB), under the Western Railroads agreement. The Administrative Law Judge concluded that provisions in the western Railroads agreement requiring the concurrence of other member lines before a carrier could opt out of approved TCFB docket infringed on a carrier's right of independent action. He also found that the Denver and Rio Grande Western should be given a voting position on the TCFB, but that provisions for the concurrent docketing of proposals before the TCFB and Western Trunk Line and Southwestern Freight Bureau would result in unnecessary delay and should not be adopted. We agree with the Administrative Law Judge's conclusions.

The TCFB traces its origin to 1887 and today retains many of the organizational characteristics of the early bureau. The primary ratemaking body is the Executive Committee, comprised of eight rail carriers, each of which is one of the 16 members of the TCFB. The eight carriers on the Executive Committee are the so-called Pacific lines and possess the eight voting positions in the Executive Committee. In the early stages of the bureau, it was generally accepted that these Pacific lines were particularly attuned to the conditions most strongly affecting transcontinental traffic to and from Pacific territory because of their locations and operating territories. Consequently, these carriers were given the voting powers on transcontinental rate proposals. See *Trans-Continental Bureau*, 77 I.C.C. 252, 257-259 (1923).

The seven appealing Pacific lines are concerned primarily over the impact the Administrative Law Judge's decision will have on the transcontinental rate structure. The transcontinental rate structure has been highly successful in moving vast quantities of commodities throughout transcontinental territory by rail. Rates and earnings per mile on transcontinental movements are purposely kept low in order to assure these movements will continue to move by rail.

The complaining railroads, such as the CRIP, Chicago & North Western Transportation Company, D&RGW, and others, are connecting lines which participate in transcontinental movements. The connecting lines, under present bureau organization, have no vote on transcontinental proposals. They object primarily to having transcontinental proposals, which they deem unfavorable to them, thrust upon them by the eight Pacific lines. For these carriers, the right to "opt-out" of a TCFB approved docket in joint movements without the concurence of the other member lines will indirectly give these connecting lines some voice in the construction of transcontinental rates, and in the case of the D&RGW, a voting position on the TCFB will assure it of a direct voice on the makeup of transcontinental rates.

The Administrative Law Judge reasoned that the ability of a carrier to "opt-out" of interline proposals of an approved bureau record without the concurrence of connecting carriers was required by the decision in *Ajayem Lumber Corp.* v. *Penn Central Trans. Co.*, 487 F. 2d 179, 183 (2d Cir. 1973), supplemented 496 F. 2d 21 (1974) certificate denied 419 U.S. 884 (1975), wherein it was held that the right of a carrier to claim its local rates by taking independent action in the form of a "flag-out" of an approved bureau docket in a joint-line movement was not to be encumbered by bureau procedures. The *Ajayem* case requires that the Administrative Law Judge's decision in this issue be affirmed.

The Administrative Law Judge also reasoned that the level of transcontinental rates has a substantial impact on the overall system earnings of many of the connecting lines participating in transcontinental movements, in particular the D&RGW, and the absence of any conclusive showing by the opposing Pacific lines that opening voting membership to all carriers which participate in the movements would seriously impair the ability of the TCFB to respond to changing conditions surrounding transcontinental movements justified opening voting membership on the TCFB to these carriers.

The impact of the proposal tendered by the D&RGW will change the makeup of the Executive Committee by permitting any member of the TCFB to become a voting member of that committee as well as the Freight Traffic Managers Committee. Under current provisions of the Western Railroads' agreement, any common carrier by railroad, subject to the Interstate Commerce Act, and their subsidiaries, engaged in the transportation of property within the jurisdiction of the TCFB may become a member of the bureau upon application. It is conceivable, therefore, that carriers, in addition to the 16 carriers already members of the bureau, will seek membership on the bureau, and similarly, membership on the Executive Committee and Freight Traffic Managers Committee. However, we do not envision the number being significantly high since the class restriction recommended by the Administrative Law Judge will limit membership to the major railroads operating in transcontinental territory. The Administrative Law Judge's conclusion will permit the infusion of connecting lines' interests in the transcontinental structure into the ratemaking process itself rather than forcing the connecting lines, as the only alternative to "flag-out" of approved docket deemed unfavorable by them.

In view of the Administrative Law Judge's recommended decisions on these two issues and our agreement with them, we believe it would unnecessarily delay processing of rate proposals to require concurrent docketing in other affected territories such as Western Truck Line or Southwestern Freight Bureau territories. Consequently, concurrent docketing of these proposals will not be required.

ULTIMATE FINDINGS AND CONCLUSIONS

We find that applicants in each of these proceedings have not shown the proposed agreements to be in furtherance of the national transportation policy and in the public interest within the meaning of section 5b of the act to warrant relief from the operation of the antitrust laws with respect to the making and carrying out of these agreements.

In view of the above finding, the agreements must be disapproved. Disapproval requires termination of the interim approval granted these agreements by order of the Commission entered October 26, 1976, in Ex Parte No. 297 (Sub-No. 1), except that paragraph (6) of section 5b of the act authorizes the Commission to postpone the effective date of any order terminating or modifying approval for such period determined reasonably necessary to avoid undue hardship. For the reasons set forth in this decision a terminating order will be withheld for a specified time to afford applicants an opportunity to present additional evidence relating to the issue of whether Commission approval of these agreements would be in furtherance of the national transportation policy.

We further find that applicants must amend their respective agreement procedures to comply with our conclusions regarding the issues of statutory interpretation of section 5b which are common to all three proceedings, as well as with our findings relating solely to certain issues involved in the Western Railroads agreement.

COMMISSIONER GRESHAM, concurring in part and dissenting in part:

While I am in agreement with the majority on many of the conclusions reached, I differ with the resolution of several issues. Specifically, I do not agree with the results reached as to the scope of permissible discussion and as to opening meetings to persons other than appropriate officials of the Commission, the Federal Trade Commission, and the Department of Justice. Further, I believe the agruments advanced by applicant railroads as to the meaning of "practicably participate" merit further attention. To the extent these views differ from the majority's, I respectifully dissent.

COMMISSIONER MURPHY, dissenting:

Although the railroads of this Nation have been operating under various types of agreements which, in some instances, predate the Interstate Commerce Act[5] and have so operated, without question, with the formal approval by this Commission of designated agreements since shortly after the passage of the Reed-Bulwinkle Act in 1948,[6] the majority would now find that applcants have failed to show that those approved agreements, as amended, are in furtherance of the national transportation policy. Even conceding that section 5b, as established by the 4R Act, Public Law 94-210, section 208, requires some modification in the formerly approved section 5a agreements, it seems inconceivable that the Commission would now propose, as it is apparently proposing, a return to the 1890's era and the decision of the Supreme Court in *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897) and *United States* v. *Joint Traffic Assn.*, 171 U.S. 505 (1898). I can see no purpose in requiring the railroad applicants to prove anew by detailed evidence the necessity for a continuance of those agreements. The hearing officer was of the same opinion and I would affirm his decisions in that respect. But, to the contrary, the majority seemingly would require applicants to "run the gauntlet" or to prove anew a need for continuance of the agreements by "a test of fire."

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[5] Cf., *Cooperative Grange League Fed. Exc.* v. *Akron, C. & Y. R. Co.*, 323 I.C.C. 174, 180-181 (1964).

[6] The present section 5a of the act which is still applicable to other carriers.

In any event, taking the most conservative view, the submission by Western Railroads[7] should be found adequate without any further evidence and clearly justifying approval of the application as in furtherance of the national transportation policy.

In its 11th hour efforts to provide some measure of belated guidance to applicants, should they decide to file anew,[8] the majority reviews several specified areas common to all applications. My disagreement with its conclusions on specified areas will be discussed separately but not necessarily in the order presented.

Single-line rates.—It is clear beyond question that proposals of member carriers which include both joint rates and local rates between the same points, on the same commodities, should not be considered within the prohibition against discussion on and voting on single-line rates. The obvious effect of the contrary approach favored by the majority is to splinter the national network of railroads in contravention of the national transportation policy and the principles governing the intent of Congress in seeking to revitalize the railroads under the 4R Act, section 101.

Affiliated carriers.—The majority proposes to consider affiliated carriers as included in the scope of single-line rates. This would prohibit nonaffiliated rail carriers from the discussion and voting on rates proposed by the affiliated carriers. In many instances, the affiliated carriers are governed by merger conditions under which routing and other provisions have been imposed to maintain a semblance of the status quo. The proposal herein would in effect nullify those merger conditions to the detriment not only of the affected carriers but also the shipping public.

Practicable participation.—The majority would restrict the terminology to such an extent that carriers operating only over the most direct routes could vote on joint rates. But this is in contravention of section 4(1)[9] and section 15(10)[10] of the act. More importantly, the majority's proposal can also be viewed as a directive to the railroads to abandon those lines over which the majority has concluded (without any evidence) that operations are redundant. However, this is not only in violation of section 1a of the act[11] but of the Commission's own regulations requiring some advance public notice of proposed abandonments.[12] I am not aware of any authority allowing this Commission to substitute its judgment for that of the railroads or other interested parties.[13]

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[7] Section 5b Application No. 2, Western Railroads—Agreement.

[8] As noted below, applicants are asked to specify alternatives to section 5b agreements. My response thereto will also be set forth below.

[9] Section 4(1) reads in part:

> *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or

(footnotes continued on next page)

Verbatim transcripts and open meetings.—In Ex Parte No. 297, this Commission found no need for verbatim transcripts. The majority would now require that all rate committee meetings be open and that tape recordings of all such meetings be maintained. The cost associated with such requirements have not been taken into consideration but obviously they will be substantial. Further, I am not aware of any provision in section 5b which requires the incorporation of Public Law 94-409[14] into rate bureau agreements. Accordingly, there is no justification for that requirement.

Moreover, the requirements for tape recordings and open meetings is tantamount to an admission that the Commission is proposing to unlawfully delegate its surrogate powers bestowed by Congress because of the lack of funding.

I would suggest as an alternative to the majority's proposal that the railroads calculate the added costs to be incurred, seek as a specific aspect revenues to cover those costs in the next general increase and allow the shipping public (not the few giants or nonshippers involved herein) by their protests or verified statements to approve or disapprove of these added, unnecessary procedures. I am unalterably opposed to unneeded regulations.

Intrastate rates.—The majority would deny any and all antitrust immunity where intrastate rates are involved. Its conclusion is

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(footnote 9 continued)

part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings.

[10] Section 15(10) guarantees the shipper the absolute right to route the traffic.

[11] Section 1a, 49 U.S.C. 1a was added by the 4R Act.

[12] See, Ex Parte No. 274 (Sub-No. 2) with respect to system diagrams.

[13] The Transportation Act of 1920 did authorize this Commission to rationalize the railroad plant. That authority, however, was revoked.

[14] Public Law 94-409, the so-called "Government in the Sunshine Act," seeks to foster openess in the Government. However, numerous exemptions therein allow the Federal agency to close a meeting. The proposed open meeting provision herein would not permit any exceptions. This inconsistent treatment demands an explanation. None is forthcoming.

largely centered on actions arising solely under section 13(4) of the act.

Section 1(15) of the act[15] authorizes this Commission to take appropriate action in an emergency. From time immemorial, emergency actions as embodied in service orders have covered not only interstate but also intrastate rates and provisions.[16] In fact, during the present car shortages several such service orders covering intrastate movements are outstanding and in use. If this Commission has no jurisdiction over intrastate rates and provisions, then those service orders to that extent are a nullity and unenforceable.

Under section 1(16)(b) of the act,[17] the Commission is authorized, under specified conditions, to direct another carrier to continue service over the lines of a carrier unable to do so. Several such orders have been issued. See, in that respect, Service Order Nos. 1207 and 1208 covering directed service over the lines of the Lehigh and New England Railway Company and *Regional Rail Reorg. Act—Submission of Cost Data*, 348 I.C.C. 320 (1975). To the extent that the Commission directed carriers to continue service over a failing line, including intrastate operation, and then validated payment of expenses incurred above the revenues derived therefrom by the directed carrier, the direction and validation would seemingly be unlawful and invalid should this Commission hold to the position that it has no jurisdiction over intrastate rates and provisions.

I believe that the approach taken by the majority is both unnecessary and inconsistent with the duties imposed on this Commission by the act. A more realistic approach would be to announce that the Commission does have authority over intrastate rates and provisions and will immunize such joint activities where the Commission by service order has asserted its jurisdiction in an emergency.

Scope of permissible discussion.—In order to facilitate the underlying purposes of the national transportation policy (NTP), the carriers should be permitted to discuss specific matters where essential to good operating practices and in furtherance of the NTP. The limited areas for discussion proposed by the majority, namely, in connection with potential violations of sections 2, 3, and 4 of the act, will no doubt exert a "chilling effect" on railroad initiative. The Commission has frequently criticized the railroads for failing to pursue innovative programs. The restrictions proposed herein will surely put a damper on such efforts in the future.

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[15] 49 U.S.C. 1(15).

[16] See, Service Order No. 1331, June 30, 1978, covering operations by the South Central Tennessee Railroad Company over the lines abandoned by the Louisville and Nashville Railroad Company.

[17] 49 U.S.C. 1(16)(b), added by Public Law 93-236.

The majority requests the applicants to address the following:

> Whether any of the goals which justify the collective ratemaking agreement under consideration can be accomplished by some method other than collective action?

Obviously, applicants can avoid the necessity of ratemaking agreements by several steps.

(1) Each single-line carrier, if that term has any meaning now, can publish only local rates and leave the shipper at the mercy of intermediaries.

(2) Each single-line carrier, with the above caveat, can also publish proportional rates beyond its lines and again leave the matter of further movement to unnamed intermediaries.

(3) Those short-line, switching and other small carriers could elect to cease operations. The provisions adopted by the majority would seemingly have that inducement.

In summary, the majority's proposals lose sight of the goals of the national transportation policy, will exert an undue influence in supporting the proposals of others for a fragmented national railroad network, and does violence to the transportation scheme erected over the last 90 years. The Founding Fathers in formulating the Constitution sought under article I, section 8, thereof to break down down the barriers to commerce imposed by State boundaries. The majority would now seek to reimpose similar barriers by the restrictive and unworkable provisions sought to be imposed herein. The Commission should ignore the pleas of those who would undermine the superb national rail network now in existence,[18] should accord competition, or "Big C," its rightful but not sole place in the transportation scheme, and should assert its expertise and jurisdiction without the many qualifications relied upon in these proceedings.

To the extent that the majority's decision does not conform to the views expressed, I respectfully dissent from that decision.

It is ordered:

Interim approval of the proposed agreements at issue here, granted by order entered October 26, 1976, in Ex Parte No. 297

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[18] The Commission's task is analogous to that of the ancient mariner saling between Scylla and Charybdis, i.e., to ignore the treacherous invitations which would wreck the vessel or in this instance, the national rail network.

(Sub-No. 1), is terminated 120 days from the date of service of this decision, unless within 90 days of the date of service applicants submit additional evidence relating to the issue of whether Commission approval of the proposed agreements would be in furtherance of the national transportation policy to warrant relief from the operation of the antitrust laws for making and carrying out these agreements. Furthermore, applicants are required to advise the Commission under verified statements of their attorneys-in-fact, that any amended agreement which may be filed will comply with the Commission's findings regarding the issues of staturory interpretation of section 5b of the act which are common to all these proceedings. In addition, applicant Western Railroads must advise as to their proposed conformity with our conclusions with respect to the Western Railroads agreement issues discussed.

If applicants submit additional evidence in accordance with this decision, the other parties of record in each of these proceedings will be permitted 45 days from the due date for such filings to submit responsive pleadings. An additional 30 days is authorized to enable applicants to reply.

No. 36473

UNION TANK CAR COMPANY—DECLARATORY ORDER—EMPTY TANK CARS

Decided December 13, 1977

Rates charged for the movement of privately owned empty tank cars for repair, from El Paso, Tex., to El Dorado, Kans., Baton Rouge, La., and Wood River, Ill., found applicable with exceptions, and not shown to be unjust and unreasonable. Proceeding discontinued.

Glenn A. McTavish, Harold E. Spencer, and *Thomas F. McFarland, Jr.,* for petitioner.

Harvey Huston and *Richard E. Weicker* for respondent.

Robert S. Davis, R. H. Stahlheber, and *Richard S. M. Emrich III,* for intervenor.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS MURPHY, GRESHAM, AND CLAPP

CLAPP, *Commissioner*:

The modified procedure was followed. On June 20, 1977 exceptions to the initial decision of the Administrative Law Judge were filed by respondent, The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and by intervenor Missouri Pacific Railroad Company (MP). Petitioner Union Tank Car Company (Union) filed its reply on July 18, 1977. Our conclusions differ from those recommended in the initial decision. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings and conclusions have been considered and found not justified or their resolution not necessary for the proper disposition of this proceeding. The facts are restated and expanded only as necessary for a proper understanding and resolution of the issues.

Pursuant to an order of the United States District Court for the Northern District of Illinois, Eastern Division, *The Atchison, Topeka, and Santa Fe Railway* v. *Union Tank Company,* CA No. 76C2372, as amended, Union filed a petition on November 15, 1976, seeking a hearing and a declaratory order under section 5(e) of the Administrative Procedure Act that the freight charges sought to be collected by the Santa Fe for the transportation of 161 empty tank cars owned by Union during the period between August 16, 1973, and September 17, 1973, are inapplicable in violation of section 6 of the Interstate Commerce Act, or, if applicable, are unjust and unreasonable in violation of sections 1(6), 1(4), and 1(5)(b).

Union own a fleet of tank cars which it leases to shippers and railroads. Immediately prior to the period August 16, 1973 through September 17, 1973, the issue tank cars were being operated in Mexico under lease to several companies. Prior to their operation in Mexico all cars had been in commercial service in the United States. Upon termination of the leases, the cars were routed to Union's repair facilities at El Dorado, Kans., Baton Rouge, La., or Wood River, Ill. Santa Fe received the cars at El Paso, Tex.

The issue is which of two tariff provisions applies to the movements of the cars from El Paso to the repair facilities. Santa Fe seeks to collect charges pursuant to the following provision:

> A new car or a newly acquired car moving prior to its first loaded move in commercial service and a car moving for sale or scrap will be moved subject to applicable rates ***.

Union contends that the following provision is applicable:

> An empty tank car, after having been loaded in commercial service on which the railroads derived line haul revenues, will be moved without charge to and from facilities for cleaning, lining, relining, maintenance, modification, or repair ***.

In an initial decision served May 11, 1977, the Administrative Law Judge found that the cars were not "newly acquired" under the provisions of the tariff as argued by Santa Fe. He found that the Mexican movements constituted only a temporary withdrawal of the tank cars from the commercial fleet, that the tariff permitting free movements does not prohibit temporary withdrawal, that the purpose of withdrawal is irrelevant, and that the one prerequisite for free movement, that the car has been loaded in commercial service at some time, had been met.

On exceptions, Santa Fe argues that the Administrative Law Judge failed to considered the mileage allowance tariff in its entirety. The reason that tank cars receive transportation without charge for repair movements is that the railroads receive compensation for the free movements through revenue collected in line-haul movement of the cars. Without the line-haul revenues, the free movements would not be permitted under the law. Here, Santa Fe argues, the Mexican railroads receiving the line-haul revenues are not parties to the mileage allowance tariff. According to Santa Fe, the tariff when viewed as a whole, indicates that the carriers involved in the line-haul movements as well as those moving the empty cars must be parties to the tariff. Otherwise, the United States railroads providing free transportation for repair are in effect subsidizing the Mexican railroads.

Santa Fe also contends that the Administrative Law Judge erred in construing the empty tank cars as instrumentalities of transportation rather than property moved solely for the benefit of the owner. Santa Fe cites ***Mileage Allowances, Tank Cars,*** 337 I.C.C. 23 (1970), for the proposition that a car can be "newly acquired" if it has been removed from the shipper's domestic commercial fleet. Santa Fe argues that the tariff should be construed strictly against the shipper, because, as in transit privileges, he is the party claiming a special privilege. Here, it is argued, the cars were just investment property of Union, rather than instrumentalities of transportation committed to the national car fleet.

The exceptions of intervenor MP are similar. MP argues that item 25 of tariff 7 makes the free transportation provisions inapplicable to the issue cars because it states that:

> These rules govern the handling of tank cars *** when used by railroads parties to this tariff *** for transportation over lines *** between points in the United States ***.

Since the Mexican railroads are not parties to the tariff, and since the revenue hauls were not made in the United States, MP argues that the free transportation provisions are inapplicable.

MP also contends that this tariff is inapplicable because the cars were not registered as required by the tariff. As the evidence indicates that the cars were properly registered, this exception will not be considered further.

In reply, Union states that the requirements of item 25 were met since the transportation at issue was transportation within the United States and over lines of railroads party to the mileage allowance tariff. Further, tariffs must be strictly construed, and the tariff requiring cars to have "been loaded in commerical service on which the railroads derived line-haul revenues" does not specify that the commercial service had to be within the United States.

Union argues, that the most recent loaded movement need not have taken place over railroads which are parties to the mileage tariff. What the tariff actually requires is only that some previous revenue haul have been made. Since all of the issue cars have at some time made revenue hauls as part of the national commercial fleet, and since Santa Fe is a party to the tariff and derives more than a minimum amount of revenue generally from the commercial tank car fleet, Union contends that Santa Fe must provide the issue transportation without charge.

Union also asserts that the Administrative Law Judge was correct in finding that the cars were not "newly acquired" within the context of the tariff. Union cites as supporting evidence the continuity of the reporting marks through the entire period, the freedom of the lessees to move the cars into the United States during the lease period, and the actual movement of some of the cars in the United States during the lease period.

Respondent is correct in stating that the tariff must be viewed as a whole. *Fine Products Corp.* v. *Gulf, M. & O. R. Co.*, 299 I.C.C. 758, 760 (1957). Such a reading of the issue tariff indicates that the requirement of item 25, that the transportation be between points in the United States and on railroads party to the tariff, is applicable to the "commercial service on which the railroads derived line-haul revenues."

As a general proposition, railroads are responsible for maintaining the car fleet necessary to provide rail transportation services. Line-haul revenue is supposed to cover all the costs involved, including the costs of moving empty cars to cleaning and repair stations. Historically, however, tank cars have been owned by shippers and other private car owners rather than by the railroads. Often the empty mileage accumulated by these cars is reasonably related to revenue hauls, such as where a car must be returned empty after carrying a load, or where a car must be transported to a shop for cleaning before picking up another load.

Under the tariff provisions linking these free empty movements to prior revenue hauls, the railroads are compensated for the empty movements by the charges for line-haul movements since the empty movements are necessary, and are essentially a part of the line-haul movements. To say that prior commercial service on Mexican railroads qualifies the cars for free transportation is illogical, since that service does not compensate United States railroads for expenses incurred in transporting empty cars.

Union is correct, however, in stating that line-haul movements other than the last movement may be sufficient to meet the requirements of the tariff. See No. 35405, ***General American Transp. Corp.*** v. ***Indiana Harbor***, 357 I.C.C. 102 (1977), ***(GAT)***. Under the tariff specific line-haul movements are not linked to specific empty movements. This is reasonable since repairs arise from use of cars by many different railroads. If the car is part of the national fleet, and if the railroad derives more than a minimum amount of revenue from the use of this kind of car, the railroad is receiving an indirect benefit from these cars and is obliged to transport the cars without charge to repair facilities. ***Id.***

The fact that a car has once made a commercial domestic movement, however, does not mean that the car automatically maintains a permanent status as an instrumentality of transportation entitled to free repair movements. ***GAT, supra; Mileage Allowances, Tank Cars, supra*** at 31-32. For example, empty cars move as property to facilities for modification or from facilities for transfer between shippers for sale or scrap. These movements are solely for the benefit of the car owner and not for revenue purposes. ***Id.*** The issue in the present case, then, is whether the prior domestic service indicates that the car belong to the national car fleet, or whether the use of the cars in Mexico constituted a withdrawal of the cars from the fleet. If the cars were no longer part of the national fleet and the domestic railroads had lost the benefit of their use, then the cars would not be entitled to free movements.

The evidence shows that 88 of the cars were leased to Mexican companies. During the periods of these leases, none of the cars were definitely loaded in commercial domestic service. Approximately 13 of the cars were loaded domestically in the year of the leases, although the evidence does not indicate whether the loading occurred during the period of the Mexican leases, or during the period thereafter when the cars were leased to other companies.

The remaining cars were leased to American companies during the time in question. Thirteen cars appear to have made domestic hauls during the lease period, and approximately 49 made such trips during the year either preceding or following the termination of the leases. Upon termination of the leases, all cars were sent to repair facilities for routine repair and maintenance. Because of its routing nature we may presume that the need for maintenance arose primarily from the operation of the cars during the time of the directly preceding lease periods. Thus the evidence indicates that except for the cars that moved domestically during the time in question, the issue cars were sent for maintenance needed as a result of commercial loaded movements made in Mexico.

We find, therefore, that the issue cars, with the exception of those cars which definitely had commercial movements within the United States during the lease periods, were withdrawn from the national car fleet while being operated in Mexico and the empty movements on return to the United States were for the benefit of the car owners not the railroads. Upon their return to the United States, in the absence of a mileage equalization rule, the cars were "newly acquired" by Union into the national car fleet, and are not entitled to transportation without charge to repair facilities without first making a commercial line-haul movement within the United States. The charges sought to be collected by the Atchison, Topeka and Santa Fe Railway Company, with the exception of cars which moved in domestic service during the lease period, are applicable and not shown to be unjust and unreasonable in violation of sections 1(6), 1(4), or 1(5)(b) of the Interstate Commerce Act.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment.

It is ordered, That this proceeding is discontinued.

APPENDIX

Rates charged for the movement of the privately owned empty tank cars for repair, from El Paso, Tex., to El Dorado, Kans., Baton Rouge, La., and Wood River, Ill., found inapplicable. Applicable tariff provisions determined and proceeding closed.

Glenn A. McTavish, Harold E. Spencer, and *Thomas F. McFarland, Jr.*, for petitioner.

Harvey Huston and *Richard E. Weicker* for respondent.

Pursuant to an order of the United States District Court for the Northern District of Illinois, Eastern Division, *The Atchison, Topeka and Santa Fe Railway* v. *Union Tank Car Company*, CA No. 76C2372, as amended, Union Tank Car Company (Union) filed a petition on November 15, 1976, seeking a hearing and a declaratory order under section 5(e) of the Administrative Procedure Act that the freight charges sought to be collected by The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) for the transportation of 161 empty tank cars owned by Union during the period between August 16, 1973, and September 17, 1973, are inapplicable in violation of section 6 of the Interstate Commerce Act, or, if applicable, are unjust and unreasonable in violation of sections 1(6), 1(4), and 1(5)(b).

By order of January 4, 1977, the Commission, Commissioner Hardin, the matter of the petition was directed for handling under the Commission's modified procedure. The parties have filed their statements of facts and argument, the last filing on April 4, 1977, and the matter has been referred to me for hearing under modified procedure and the issuance of the Commission's initial decision. The verified testimonies and exhibits of all witnesses are received in evidence.

Union owns a fleet of about 44,000 tank and covered hopper cars which it leases to shippers and railroads. It maintains repair facilities at Baton Rouge, La., El Dorado, Kans., El Segundo, Calif., Laurel, Mont., Whiting, Ind., and Wood River, Ill. Upon termination of a lease Union's district sales office instructs the lessee of the cars to route them to a Union repair facility for ordinary repair and maintenance. Immediately prior to the period August 16, 1973, and September 17, 1973, the 161 tank cars were being operated in Mexico under lease to several chemical companies. Instructions to route the 161 cars were given to the several lessees to route the cars to Union's repair facilities at El Dorado, Baton Rouge, or Wood River. Santa Fe received the cars at El Paso, Tex. Prior to their operation in Mexico all 161 cars had been in commercial service operation in the United States. In the court complaint Santa Fe seeks collection of charges assessed pursuant to the following tariff provision:

> A new car or a newly acquired car moving prior to its first loaded move in commercial service and a car moving for sale or scrap will be moved subject to applicable rates named in Consolidated Freight Classification and/or Uniform Freight Classication, or in State classification tariff where State rates apply, or other applicable tariffs.

Union contends that the movement of the 161 cars was made under a tariff provision which reads:

> An empty tank car, after having been loaded in commercial service on which the railroads derived line haul revenues, will be moved without charge to and from facilities for cleaning, lining, relining, maintenance, modification, or repair upon receipt of instructions, confirmed in writing, showing facility, destination, and full routing and reason for such movement.

The Mexican railroads are not parties to the mileage-allowance tariffs, and during the period that 161 cars were in operation on the lines of those railroads they are not in the "commercial service" contemplated by the above.

The basic differences between the views of Santa Fe and Union are the meanings given "after having been loaded in commercial service on which the railroads derived line haul revenue" and "a newly acquired car moving prior to its first loaded move in commercial service." Santa Fe contends that since the cars left commercial revenue with American railroads and then reentered the United States for repairs they must be considered as "newly acquired" cars for operation on American railroads. Union contends that the right to the no charge movements to repair facilities was not lost by entry of the cars into Mexico for periods of any length.

In determining the meaning of tariff provisions the ususal rules commonly applied to statutes and contracts are applied. *C.S.W. R.R.* v. *Farmers' Shipping Assn.*, 59 F. 2d 657; *Penna. R.R. Co.* v. *International Coal Co.*, 230 U.S. 184, 197; *P. & S. R.R.* v. *Commodity Credit Corp.*, 83 F. Supp. 639, 641; *C.R.I. & P. R.R.* v. *Furniture Forwarders of St. Louis*, 267 F. Supp. 175. The tariff provisions must be strictly construed and the terms used therein must be taken in the sense in which they are generally understood and accepted commercially. *Texas Gas Transmission Corp.* v. *Alton & S. R.*, 310 I.C.C. 207, 210; *Arco Trading Corp.* v. *Missouri Pac. R. Co.*, 314 I.C.C. 225, 227; *Middlewest Motor Freight Bureau* v. *Chicago, B. & Q. R. Co.*, 309 I.C.C. 303, 305. Here "newly acquired" means "came into possession," "obtained," "gotten as one's own." *U.S.* v. *Hibernia Bank Bldg.*, 76 F. Supp. 18, 19. "Newly acquired" may not here be interpreted to mean acquired by Union upon termination of its leases with the shippers. Otherwise all moves to repair facilities from "commercial service" after lease terminations would not qualify for movement "without charge." This has never been the situation. Union does not acquire cars from its lessees whether such lessees use the cars on American or Mexican railroads. Santa Fe's argument that the cars are newly acquired with respect to Union's fleet of cars operating in the United States is untenable. As used in the tariff provision "newly acquired" has nothing to do with the acquirer's purpose and may not be so interpreted by the carrier. A newly acquired car need not necessarily enter acquirer's fleet of cars operating in the United States. The acquirer is free to do whatever he pleases with a newly acquired car, *e.g.* use it for storage, for display, for research, or other purposes.

There is nothing in the tariff provision sought by Union which would preclude its application by a temporary removal of a car from the commercial fleet for any length of time whether it be 1 day, 1 week, 1 month, or 1 year. Nor is there anything in that provision which would preclude its application by a temporary removal of a car from the commercial fleet for any specific purpose, whether it be for storage, for repair, or for operation on Mexican railroads. The cars are entitled to movement without charge to facilitate for repair and maintenance so long as the cars have been loaded in commercial revenue service and instructions for such movement confirmed in writing. No other interpretation may be reached without a strained and unnatural tariff construction.

In view of the foregoing it is not necessary to consider the section 1 issue.

I find that cars temporarily out of commercial revenue service are not newly acquired cars in the movement to repair and maintenance facilities, but are entitled to movement without charge so long as the cars are shown to have been previously loaded in commercial revenue service and instructions for such movement is confirmed in writing.

I further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That in the absence of a stay or postponement by the Commission, or the timely filing of exceptions the effective date of this order shall be 30 days from the date of service thereof.

SECTION 5b APPLICATION NO. 4

SOUTHERN PORTS FOREIGN FREIGHT COMMITTEE—AGREEMENT

Decided March 24, 1978

On appeal, findings in prior report, 355 I.C.C. 216, relating to rate bureau agreements proposed by rail carrier members of the Southern Ports Foreign Freight Committee pursuant to section 5b of the Interstate Commerce Act, affirmed in part and reversed in part. Interim approval of the agreement to be terminated 30 days from date of service unless applicants file a revised agreement in conformity with the conclusions reached in this report and order.

F. R. Birkholz, Louis A. Harris, and *William C. Sippel* for appellant Southern Ports Foreign Freight Committee.

Alfred F. Dougherty, Jr., Jerry A. Philpott, and *David I. Wilson* for the Federal Trade Commission, appellant and replicant.

John F. Donelan and *Frederick L. Wood* for the National Industrial Traffic League, replicant.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

By appeals filed September 28, 1977, and October 18, 1977, rail carrier members of the Southern Ports Foreign Freight Committee (ports committee or applicants) and the Federal Trade Commission (FTC) seek review of certain findings made in the report by division 2 in *Southern Ports Foreign Frt. Committee—Agreement,* 355 I.C.C. 216 (1977). In that report, the division found that approval of a rate bureau agreement as proposed by applicants pursuant to section 5b of the Interstate Commerce Act is not prohibited by paragraphs (4)[1] and (5)[2] of section 5b, and that, by reason of furtherance of the national transportation policy declared in the act, the antitrust relief provided in paragraph (8) of section 5b should apply with respect to the making and carrying out of the agreement,[3] subject to certain terms and conditions.[4] That basic finding is not challenged on appeal. However, the division found that final Commission approval could not be granted until applicants filed an amended agreement curing the deficiencies found by the division. The issues raised on appeal are directed to certain of the subsidiary findings and conditions for approval prescribed by the division.

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[1] Agreements with respect to a pooling, division, or other matters to which section 5 is applicable may not be approved under section 5b.

[2] Section 5b(5) relates to the right of independent action, participation in single or joint-line movements, and joint consideration or action to protest or seek suspension of rates or classifications established by independent action.

The modified procedure has been followed in this proceeding. The ports committee and the FTC filed replies to each others' administrative appeals. The National Industrial Traffic League (NIT League) filed a reply to the administrative appeal of the ports committee only. For the reasons set forth below, the conclusions of division 2 are modified as to certain issues raised in this appeal. In all other respects, the prior decision (including all terms and conditions for final approval of the proposed agreement which have not been raised on appeal or discussed in this report) is affirmed and adopted as our own. The statement of the case and nature of the proposed agreement, along with all relevant provisions, has been described and discussed in the prior report and will be restated here only as necessary for a proper understanding of the issues. Requested findings not discussed specifically in this report nor reflected in our findings have been considered and found not justified or their resolution not necessary for the proper disposition of this proceeding.

PROCEDURAL MATTERS

Late-filed appeal.—The prior report and order was decided August 30, 1977, and served September 8, 1977. By petition filed October 18, 1977, the FTC, a party to the proceeding, asks leave to late-file an administrative appeal (also filed October 18, 1977) from the report of division 2.[5] In support of the petition, FTC states that so far as it can ascertain, it was not served with the initial decision and only became aware of it upon receipt of the administrative appeal of applicants on September 30, 1977.

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[3] Division 2's ultimate findings are set out at 355 I.C.C. 216, 235-36.

[4] Section 5b provides, in revelant part, that:

> No *** approval shall be granted or continued (a) if any of the terms and conditions which are prescribed under the last sentence of this paragraph are violated or not complied with ***. The approval of the Commission shall be granted only upon such terms and conditions as the Commission determines are necessary to enable its approval to be granted in accordance with the standard set forth in this paragraph.

The particular terms and conditions which division 2 imposed upon applicants, along with other deficiencies which division 2 found to exist in the agreement as proposed, are set out in the prior report and will be discussed here only to the extent necessary to dispose of issues raised on appeal.

[5] Rule 98(c) of the Commission's General Rules of Practice (49 CFR §1100.98(c)) requires that appeals must be filed within 20 days from the service date of the decision being reviewed.

Although enforcement of time limits under the Commission's rules is particularly important in cases arising under the 4R Act, we think it appropriate hereto allow the FTC's late-filed appeal. The requested relief is unopposed by the other parties and it does not appear that they will be prejudiced by allowing the appeal. Moreover, the issue raised by the FTC in its appeal has not been raised by other parties and is an important one. The FTC's petition to allow its appeal is, therefore, granted.

Deferred issues.—In its report, division 2 found that section 2(d) of article I of the agreement, which gives members the right to discuss any matters coming before the ports committee, was vague and indefinite in the absence of standards defining the scope of such activity.[6] It required that the ports committee, in in filing an amended agreement, set out with definiteness the nature and parameters of discussion in view of the statutory prohibitions which preclude voting and participation in agreement on single-line rates and limit voting and agreement concerning joint-line rates to those carriers who can practicably participate in the movement.[7] On the related issue of whether or not verbatim transcripts of all rate committee proceedings should be required, the division noted that it may be necessary to require such transcripts in some instances, depending on the nature and scope of collective rate bureau action. Final disposition of that issue was delayed:

> until such time as applicants have detailed the nature, scope and procedures relating to discussion of single-line and joint-line rates within the context of the instant agreement.[8]

In its administrative appeal, the ports committee has not raised the issues of the permissible scope of discussion and verbatim transcripts, stating that after disposition of its appeal, it would submit an amended agreement detailing the scope of discussion of single- and joint-line rates and would at that time present arguments relating to verbatim transcripts.

The FTC requests that we postpone all administrative appellate proceedings in this case until after the ports committee submits an amended 5b agreement for approval. In support of the petition, FTC contends that because division 2 made no ruling on the precise scope of permissible single-line rate discussion or the necessity for verbatim transcripts, the FTC cannot present its position on these issues on appeal. In addition, the FTC notes that it cannot deal with these issues by way of reply since the ports committee has deferred making arguments on these points until after it submits an amended agreement. The FTC's expressed concern is that the Commission will make a ruling on the issues adverse to the FTC's position without affording it an opportunity to be heard. If the request to postpone the appellate proceedings is denied, the FTC requests, in the alternative, that it be guaranteed an opportunity to be heard on the deferred issues.

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[6] 355 I.C.C. 216, 229.

[7] *Id.*

[8] 355 I.C.C. 216, 229.

Since applicants have chosen not to file amedments to the agreement detailing the nature, scope, and procedures relating to discussion of single-line and joint-line rates until other matters raised in this appeal have been disposed of, it is clear that no resolution of that issue, or the related issue of verbatim transcripts, can be made in this proceeding. Therefore, those issues will be handled in a separate subproceeding following disposition of this appeal in the manner described in our order below. The FTC will be afforded an adequate opportunity to participate in the subproceeding. In such proceedings, we will also consider whether open meetings might be required in lieu of verbatim transcripts.

Under the circumstances, we hereby reiterate division 2's admonishment to applicants to cease and desist from engaging in any discussions under the interim approval granted by our order below.

DISCUSSION AND CONCLUSIONS

Issues presented.—In its appeal, the FTC raises only one issue; *viz,* whether the term "practicably participate" (relating to prohibitions on collective ratemaking) as defined in the agreement, and as approved by division 2, is too broad.

In its appeal, the ports committee contests seven modifications or amendments which division 2 imposed as conditions to final Commission approval of the agreement. Specifically, applicants object to the following changes mandated by division 2:

(1) Elimination of a provision that would permit a majority of members present at a meeting to determine carrier eligibility to vote and agree on proposals. 355 I.C.C. at 230.

(2) Restrictions on mail or telegraphic handling of proposals. 355 I.C.C. at 233.

(3) Requirement that 14 (as opposed to 7) days public notice be given on broadened proposals. 355 I.C.C. at 234.

(4) Requirement that public notice of final action contain reasons for the action taken. 355 I.C.C. at 234.

(5) Elimination of certain matters from article permitting rate bureau processing without public docketing. 355 I.C.C. at 234.

(6) Requirement that a definition of general increases and decreases be included in the agreement. 355 I.C.C. at 228.

(7) Elimination of references to section 5a of the act in articles providing for amendments to the agreement. 355 I.C.C. at 234-35.

Eligibility to participate and vote.—Section 5b of the act prohibits carriers which canot practicably participate in an interline movement from participating in agreements with respect to it. 49 U.S.C. §5b(5)(a)(ii). The ports committee agreement provides that a "carrier can practicably participate in a movement involved in a proposal if such carrier participates in a route as published in a tariff on file with the [I.C.C.] from an origin involved in a proposal to a destination involved in a proposal."[9] In the prior report it was found that the quoted language was an adequate statement of the standards necessary for determination of eligible member carriers authorized to consider collectively or vote on an interline proposal.[10] In so finding, the division rejected NIT League's contention that a carrier must also participate in the movement of the particular commodity involved in the proposal to "practicably participate" therein.[11]

No justification for such a restriction was found in the statutory language and the division stated that it would preclude carriers seeking to establish rates on traffic not previously handled over their lines from participating.[12]

On a related issue, the division found unacceptable a provision in the agreement[13] which would permit a majority of the members present at a meeting to determine the carriers eligible to vote and agree on a particular proposal.[14] The division observed that such a provision leaves carrier eligibility a matter of discretion of the majority, possibly in contravention of the statutory prohibitions.

The FTC objects to the definition of "practicably participate" approved in the prior report because it does not require that a route

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355 I.C.C. at 229.

Id. at 230.

Id.

Id.

Article I, section 2(d)(5) of the agreement.

Upon objection of any member to an original determination of eligibility by the chairman.

be reasonable or that any shipper has even used it. The existence of a hypothetical alternative route, the FTC states, does not guarantee that any shipper would avail itself of it; and a route may be so circuitous or involve so many switchings that it may not offer a practical alternative to shippers for whom time is a factor. The FTC expresses concern that an allegedly overly broad standard would facilitate collusion because carriers who are relatively disinterested in a particular movement, but nevertheless eligible to vote, could trade a vote on that movement for favorable votes on movements in which they may more actively participate.

The FTC urges the Commission to require that a member of the Committee desiring to vote on a joint-line rate show that it either currently participates in the specified movement or has done so within the last 2 years.

In reply, the ports committee objects to the FTC's proposed definition of "practical participation" on grounds that it was raised here (on appeal) for the first time and that the alleged potential for collusion under the approved defintion is unsupported in the record. On the merits, the ports committee contends that the FTC's proposed definition should be rejected because no member of the ports committee would be eligible to agree and vote on proposals covering traffic which has not moved by rail for various reasons within the past 2 years. Furthermore, the ports committee argues, FTC's proposed definition is subject to the same infirmities as the original NIT League proposal which would have restricted participation to those who participate in the movement of the particular commodity involved.[15]

With respect to division 2's finding that a determination of carrier eligibility by majority vote was unacceptable, the ports committee asserts that that provision in the agreement merely provides an established parliamentary procedural remedy[16] if the correctness of the chairman's application of the tariff standard is challenged. There is no intent, applicants aver, to override the published tariff standard for "practical participation" by majority vote. To make this clear, applicants would amend articles I, section 2(d)(5) of the agreement to state that a majority of the members present shall resolve disputes as to voting eligibility "in accordance with the applicable standard for eligibility set out in this section."[17] This procedure, as amended, is supported by NIT League in its reply statement.

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[15] See discussion, *supra*, at p. 6. See also 355 I.C.C. at 230.

[16] See rules 14 and 61(e), *Robert's Rules of Order*, pp. 37-38, 114-15 *(Pyramid Edition*, 1970).

[17] This modifying language was submitted by applicants in a letter dated October 3, 1977. It modifies the previous modifying language proposed by applicants in their administrative appeal, filed September 28, 1977, at p. 5.

We find that the definition of "practicably participate" contained in the agreement and approved in the prior report is too broad a standard. There is merit in the FTC's criticism that the definition does not require that a route (the participation in which would be the basis of a carrier's eligibility)[18] be realistic or that any shipper has ever used it. Adoption of that definition would permit carriers to vote on proposals involving traffic in which they have no real interest and in which they could not competitively participate, simply because the carriers maintain a tariff for an impractical route.

We also find ourselves in disagreement with the division's rejection of the commodity restriction originally proposed by NIT League. While the statutory language does not make reference to "commodities," we find nothing in the statutory history of the section that would preclude such a restriction from being incorporated into the agreement. Precluding carriers which do not handle the commodity involved in a proposal (or have not done so in the last 2 years) from agreeing and voting is a reasonable means of separating out those carriers who should not have a voice in the determination of an interline rate under the satutory standard.

Notwithstanding the above, we believe there is merit to applicants' contention that the definition proposed by the FTC is overly restrictive. By limiting carrier eligibility to agree and vote on interline proposals to those carriers who currently participate (or have in the last 2 years) in the "specified movement," the FTC's proposed definition would eliminate collective consideration by member carriers of proposals covering new traffic not previously handled by the rail carriers. The definition disregards the satutory language (which reads "*can* practicably participate") by not recognizing that carriers who do not or have not carried the particular traffic may nevertheless be a potential competitor and participant.

We believe that both the FTC's and applicants' concerns can be accommodated to some extent, and the congressional policy in this area upheld, by adopting a definition that incorporates certain elements of both the applicants' and FTC's proposed definition. Accordingly, applicants should limit agreement and voting on interline proposals to those carriers who either currently handle the traffic which is the subject of the proposal as an origin, destination, or intermediate carrier, or have done so within the past 2 years. However, in order to permit agreement and voting on proposals involving new traffic (i.e., traffic that has not moved by rail within the past 2 years), the definition should permit those carriers who will handle the new traffic to agree and vote on such proposals.

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[18] Under the definition presently contained in the agreement, a carrier need only "participate in a route as published in a tariff *** from an origin involved in a proposal to a destination involved in a proposal."

A definition of "practical participation" drafted in accordance with these terms will alleviate the FTC's concern that a carrier, who could only participate through a circuitous, impractical routing which shippers are unlikely to use, would be able to trade its vote for that of another carrier on a proposal in which the former had a more direct interest. Such potential collusion would be substantially eliminated by the requirement that the traffic involved must be carried currently (or within the last 2 years) by the carrier.

To the extent that the definition represents a restrictive construction of the statutory language, we think that it is justified by the rule of construction that requires that antitrust exemption statutes must be construed narrowly so as not to derogate the antitrust laws unnecessarily.[19] In Section 5b Application No. 10, *Tidewater Coal Demurrage Agreement,* 356 I.C.C. 66, (1978), we stated our adherance to that principle in the context of determining whether the benefits of a proposed agreement under the national transportation policy outweighed its anticompetitive effects. We think the principle equally applicable in construing the particular terms of an agreement once it is found that such an agreement itself should receive antitrust immunity. A narrow construction of "practicably participate" in this context favors competition and is, therefore, consonant with the objective sought by Congress in enacting the particular prohibition.

That part of the definition which would permit voting on new traffic should alleviate applicants' concern that ports committee members will be prohibited from collectively considering proposals involving traffic which has not been handed by rail carriers within the past 2 years. The definition will allow participation by carriers who will participate in proposals involving (1) traffic which has moved by competitive modes, but not by rail, for the past 2 years; (2) commodities which will move for the first time from given origins because of construction of new manufacturing or production facilities; (3) commodities which will move for the first time by rail because of rail line extension; and (4) new commodities named for the first time in the Uniform Freight Classification, for which commodity rates must be established. This aspect of the definition should cure applicants' primary objection to the FTC definition which would have limited carrier participation in interline movements to proposals which modify existing rates on rate structures.

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[19] See discussion in Section 5b Application No. 10, ***Tidewater Coal Demurrage Agreement,*** 356 I.C.C. 66, 77-78 (1978).

With respect to the procedure for determining eligibility to vote on proposals, we believe that the initial determination of eligibility is best left to the individual carriers (rather than the chairman). Prior to agreement or voting on each proposal, the chairman should announce the names of those carriers who claim eligibility and any member may object to the initial determination of eligibility. We find that the parliamentary procedure currently contained in the agreement[20] for determining the question is appropriate if amended (as proposed by applicants) to restrict the basis of such determinations to the applicable standard contained in the agreement.

Since we deem the matter of interline voting crucial, we will give particular attention to the operation of the ports committee in determining voting eligibility. To this end, the ports committee should keep a record of those carriers voting on particular interline proposals and the final disposition of any committee determination of an eligibility question concerning an individual carrier. Carriers who have agreed and voted on interline proposals should be prepared to give evidence that the ports committees' standards have been fully met.

Mail or telegraphic disposition of proposal; public notice period for boardened proposals.—The proposed agreement provides that proposals concerning any traffic matter covered by the articles of organization may be made by any shipper, shipper's organization, carrier, other railroad organization, the ports committee chairman, or any interested party. As more fully described in the prior report,[21] the agreement provides that those proposals are to be handled in the following manner:

> (1) With certain exceptions not relevant here, the chairman promptly publishes notice of the proposal, accompanied by a statement that there will be no final disposition earlier than 14 days as to regular mail proposals, 7 days as to emergency

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[20] See article I, section 2(d)(5).

[21] 355 I.C.C. at 221-22. The full procedure is set out in article I, section 7 of the agreement.

mail proposals, and 5 days as to emergency telegraph proposals,[22] from the date of publication. (Article I, section 7(c).)

(2) If within the time periods specified "any interested party" asks the chairman for a public hearing on any matter so publicized, "such hearing shall be accorded." The matter is then docketed for consideration by the general committee of the ports committee. The chairman publishes notice of all hearings either 14, 7 or 5 days in advance, depending on the type of proposal.[23] (Article I, section 7(d).)

(3) Unless asked to docket a proposal for consideration by the general committee at a meeting, the chairman submits each proposal to members of the general committee by mail within 14, 7, or 5 days of the original publication. (Article I, section 7(b).)

(4) Proposals submitted by mail or telegraph "shall stand approved" unless within the time limits set out above "objections" are recorded by two or more members. If objections are so filed, the chairman notifies the membership that the matter will be docketed for consideration at the next regular meeting of the general committee or at a special meeting. (Article I, section 7(b).)

(5) An approved proposal may be broadened territorially or by commodity beyond the limits of the original proposal. Promptly after such action is taken, the chairman publishes notice, describing the broadened nature of the proposal. If within 7 days, notice of opposition or request for public hearing is filed with the chairman, the action, to the extent broadened, must be treated as a new proposal. If no requests for public hearing are received within the 7-day period, the action, as broadened, becomes effective and is announced by the chairman.

Division 2 found that the part of the procedure which provides that proposals stand approved unless objected to by two or more member carriers does not permit input and joint discussion and consideration in the event an interested party, other than a member, raises objections.[24] The division concluded that mail or telegraphic handling of proposals should, therefore, be restricted to those to which no interested person has filed an objection.[25] The prior report also concluded that public notice of broadened proposals as provided in section 7(e) of article I should be no less than the 14-day notice period for original proposals as set forth in section 7(c).[26]

On appeal, it is the ports committee's position that the shipper's interest is protected in the agreement as presently drafted because any interested party may, during the publicity periods specified, request a public hearing on a proposal. Applicants propose the following amendment to article I, section 7(b) of the agreement to make this point clear:

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[22] In the prior report, it was found these procedures were vague and indefinite and the ports committee was required to amend the agreement to define "emergency proposals" and include definite standards to justify expedited handling of traffic matters. 355 I.C.C. at 233. That finding is not at issue on appeal. However, it should be noted that 5-and 7-day notice periods would be under almost all circumstances inadequate to afford interested parties the time necessary to consider the proposal and a proper response. The definition of "emergency" in this context should, therefore, very narrowly circumscribe the situations where such procedures would be applicable.

[23] See n. 22 *supra* and accompanying text.

[24] 355 I.C.C. at 233.

[25] *Id.*

[26] *Id.* at 234.

> Proposals submitted my mail or telegraph shall stand approved unless within the time limit aforesaid objections are recorded by two or more member lines, *or unless a public hearing is timely requested. If a public hearing on a proposal is so requested, said proposal shall not be acted on until after the public hearing has been held.* [Agreement, p. 30; proposed additional portion underscored.]

Moreover, applicants contend that if the division's requirement is upheld, it would mean that any interested person, regardless of whether he ever asks for a public hearing, could prevent mail or telegraphic handling and force the subject to a meeting by simply objecting, thereby compelling the ports committee's widely dispersed 16 members to convene.

With respect to the issue of a shortened publicity period for broadened proposals, the ports committee states that joint consideration of an original proposal often yields broadened proposals which serve to preserve equality of opportunity among competing shippers in common markets. In making rate adjustments which affect a number of such competing shippers, the ports committee contends that timing is crucial in making simultaneous adjustments which treat those shippers fairly. However, it is argued that if a 14-day publicity period is required for the broadened portion of a proposal, it will frequently be impossible to observe the same publication and effective date for the rates involved in the original portion of the proposal as for those involved in the broadened portion, thereby creating potential unfairness to competing shippers.[27]

We find that the procedures relating to mail and telegraphic disposition of proposals, if amended as proposed by applicants, adequately protect shippers' and other interested parties' right to have the proposal considered before the general committee. We read the agreement to permit "any interested person" to force a proposal to be so docketed for consideration if a request for hearing, in the form of an objection or otherwise, is made within the initial publicity period. The revised language will make this point clear and unequivocal.

However, the agreement, even as amended, does not give adequate opportunity for shippers or other interested persons to make their views on a particular proposal known to voting members short of forcing the matter to a hearing before the general committee. Shippers, like carrier members, may also be inconvenienced by the necessity to travel to such a hearing. The agreement should be amended to provide any interested person with the opportunity to submit written comments to the carrier members prior to voting. Such a procedure should provide more effective and meaningful shipper input to the carriers on the effects of proposed changes in rates and rate structures without requiring that the shipper force a proposal to public hearing to make its views known.

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[27] In reply, NIT League supports applicants' position on both of these issues. The FTC takes no position.

With respect to the time limit for notice of broadened proposals, we concluded in Ex Parte No. 297, ***Rate Bureau Investigation,*** 349 I.C.C. 811, 834 (1975), that notice of broadened proposals must be given in the same manner as the original to ensure that due process is accorded all interested parties. Applicants have presented no compelling reasons to alter that conclusion here by permitting a shortened notice period.

Reasons for final action.—In response to assertions by shippers concerning the lack of information and justification for the disposition of ratemaking proposals in Ex Parte No. 297, ***supra,*** we stated that public notice of recommended final dispositions should contain the reasons for the action taken. This requirement was imposed upon the ports committee by division 2.[28]

On appeal, the ports committee contends that such a requirement should be rejected as impractical because there is no collective reason stated by its members for any final disposition and there often is none because individual lines may vote the same way for different reasons.[29] The requirement would impose an unconscionable burden, it is argued, on the committee's staff and members, particularly in situations where proposals are finally disposed of by mail or wire. Each member would have to be contacted to determine why it did not object to a proposal and inevitable differences given by individual lines would have to be reconciled. Unlike the procedures involved in other rate bureaus, the ports committee argues that its procedures do not provide for the formulation of a recommendation and preparation of a report which contains reasons.

We find the ports committee's arguments as to the impracticability and burdensomeness of giving reasons for rate bureau action unconvincing and, therefore, affirm the division's conclusion that public notice of final action contain such reasons. The central issue here is not whether the ports committee members can presently provide reasons for the final disposition of a rate proposal, but whether they should now be required to do so. While it is clear that the requirement will impose some burden on the ports committee in revising its procedures, the record contains no evidence that the burden is insuperable or even a heavy one. Requiring a statement of reason(s) will provide shippers with more adequate information as to the justification for proposals and thereby promote, to some degree, more effective shipper participation and more informed decisions as to whether to protest a particular rate bureau action. Moreover, a rate decision supported by a sound reason or reasons may dissuade unnecessary protests. In any event, we believe the public interest in providing shippers with a more effective and meaningful forum outweighs the ports committee's interest in simple procedures.

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[28] Both the FTC and NIT League urge us to affirm the division on this issue.

[29] The ports committee had argued that the requirements applied only to motor carrier rate bureaus. This contention was specifically rejected by division 2 (355 I.C.C. at 234) and is not renewed by applicants on appeal.

We do not find it necessary to impose any specific procedures on the ports committee for complying with this requirement. The details are best left to the ports committee, so long as the result is achieved. However, to alleviate certain concerns raised on appeal by the ports committee, it should be noted that in cases where proposals are handled by mail or wire, without objection or hearing, the reason given by the proposing line would constitute the official reason. There would be no need to poll members to determine reasons why no objection was filed. In cases where various reasons are given by members, only the predonminant or prevailing reasons for the action taken need by given.[30] However, in cases where no such predominant reason can be readily ascertained, the notice of final action may so state and then enumerate reasons given.

Processing certain matters without public docketing.—Article III, section 1 of the ports committee agreement lists certain matters which need not be placed on the public docket or publicized. Those exempted matters at issue here are set out in the agreement as follows:

ARTICLE III PROVISIONS APPLICABLE GENERALLY

SECTION 1—PROPOSED CHANGES WHICH NEED NOT BE PUBLICIZED. The following classes of subjects need not be placed on the public docket or publicized:

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[30] Cf. Section 5b Application No. 3, *Eastern Railroads—Agreements* (not printed), decided November 1, 1977, at sheet 19, for a general discussion of this matter. It should be noted, however, that Section 5b Application No. 3 is presently pending on appeal.

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(d)—To place one route on the same basis as another route unless there is important intermediate territory involved, in which event the changes will be placed on the public docket.

(e)—Establishment of rates on commodities upon which it is customary to publish commodity rates and upon which class rates or combination of intermediate rates only are in effect, to place them in relation with rates in the same general territory on the same commodity, provided this does not result in an advance.

(f)—Establishment of transit arrangements where none now exist to place such points on the same basis as generally applies through the same territory.

(g)—Local rates the same as from contiguous points of origin or to contiguous points of destination.

(h)—Establishment of rates made by differential routes on the usual differential basis under the rates via standard routes.

(i)—Establishment of rates on commodities upon which it is usual to apply the same rate as on another commodity when made the same as the rate on such other commodity, provided it does not result in an advance.

(j)—Proposals involving changes in rates, charges or rules under Section 22 of the Interstate Commerce Act.

(k)—Tariff changes listed below:

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(13)—Changes in charges or arrangements for transferring property between depots or transfer points.

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(15)—Changes in pick-up and delivery service.

Division 2 found that matters referred to in paragraphs (d) through (j) of section 1 should be subject to the notice provisions of the proposed agreement.[31] Division 2 also found that paragraphs (13) and (15), concerning changes in charges for transporting property between depots and changes in pickup and delivery service should be eliminated from the provisions of section 1(k).[32]

On appeal, it is the ports committee's position that the exceptions to public docketing in section 1 of article III should not be disallowed because neither NIT League nor any individual shipper has objected to the continuation of such expediting provisions in the agreement. In addition, applicants state that to the best of their knowledge, no shipper has objected to these provisions in the course of the ports committee chairman's 14 years experience. Applicants put particular emphasis on the alleged need to allow continuation of paragraph (d) of section 1, which permits committee members, without public docketing or publicity, to place one route on the same basis as another unless important intermediate territory is involved. In support, it is contended that once rates are established between given origins and destinations (pursuant to bureau procedures or by independent action), there is no public interest in publicly docketing proposals simply to liberalize routing on the same rates between precisely the same origins and the same destinations.

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[31] 355 I.C.C. at 234.

[32] In making this latter finding, division 2 inadvertently cited paragraph 14 of section 1(k) of article III. In citing paragraph (14) (which embraces only "changes in rates, or charges for the purpose of correcting typographical or clerical errors"), it is obvious that division 2 intended to cite paragraph (15), which refers to "changes in pick-up and delivery service."

In reply, NIT League supports the ports committee's position that these exceptions to the public docketing procedures should be retained.[33] NIT League states that the exceptions have been established pursuant to a longstanding agreement between itself and the railroads, that they are found in every railroad rate bureau agreement and have been approved by the Commission in the past.

In requiring that these matters be subject to the notice provisions of the agreement, the division stated that they appear to be matters which affect shippers.[34] At that time, no explanation had been offered to justify these exemptions. Based on the explanation the applicants have now presented, it is clear that the exemptions are intended to benefit interested shippers. As the NIT League points out in support of the exemptions, they are of long standing and were initially included at its suggestion. The purpose of the exemptions is to expedite the publication of noncontroversial tariff matter. For example, paragraphs (d) through (i) relate to tariff provisions that are already in effect. The types of changes covered by these paragraphs do not alter the basic provisions. They merely add new routes near origin or destination points, related commodities, or new transit points to existing tariff matter. Where such changes could result in advances in rates, it is specifically provided that the exemption from public docketing will not apply.[35] To require the public docketing of the types of changes covered by these paragraphs would only serve to delay their ultimate publication to the possible detriment of the interested shippers who would be unable to take advantage of the changes in the interim. Section 1(k) involves a group of very minor and insignificant tariff changes. Those matters referred to in paragraphs (13) and (15) are very similar to others within section 1(k) and there appears to be no good reason for singling them out. We, therefore, find that continuation of these exceptions to the notice and docketing procedures should be allowed until such time as abuse is discovered and brought to our attention. Since all of these changes have been exempt from public docketing for many years without shipper objection, we find that their continuation as exempt matters in the proposed agreement is appropriate.

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[33] The FTC takes no position on the issue.

[34] 355 I.C.C. at 234.

[35] See article III, section 1(e) and (i).

Paragraph (j) relates solely to section 22 quotations negotiated between Government agencies and other carriers. Exempting such proposals from the public docketing requirements is consistent with our holding in Ex Parte No. 297, *supra*[36] that ratemaking organizations do not enjoy antitrust immunity if participating in such activities in the absence of approved special procedures. Since the proposed agreements contains no such procedures, the ports committee must necessarily limit its activity concerning such matters to notification to members and the governmental agency.

Definition of "General Rate Increase and Decreases."—Section 5b(5)(6) of the act permits voting on "general rate increases and decreases" by all carrier members of a rate bureau without regard to the limitations on voting contained in section 5b(5)(a). Paragraph (d)(4) of section 2 of the ports committee agreement recites the statutory language of section 5b with respect to "general increases and decreases" without defining the phrase. In its report, the division found that the phrase requires a more detailed explanation in order that the agreement be definite and certain by its own terms.[37]

On appeal, the ports committee points out that the Commission has defined general rate increases in two proceedings[38] and that one those definitions is now set forth in 49 CFR 1102.1 as follows:

> [I]ncreases in freight rates or charges for the account of substantially all common carriers by railroad in the United States or in any of the three primary ratemaking

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[36] 349 I.C.C. at 837.

[37] 355 I.C.C. at 228.

[38] See Ex Parte No. 290 (Sub-No. 1), *Procedure—Rail Car. General Increase Proceedings*, 349 I.C.C. 22 (1974), and Ex Parte No. 290, *Procedures Governing Rail General Increase Proc.*, 351 I.C.C. 544, 614 (1976).

> territories, namely, eastern, western, or southern,***. An increase in freight rates or charges, by the carriers indicated, applying to a substantial number of commodities or service, for which the justification is revenue need, shall be deemed a general increase***.

The ports committee contends that it should not be required to include that definition in its agreement because the present Commission definition may change. If so, they argue, the ports committee and the Commission will be subjected to amendment proceedings—a completely unwarranted administrative burden, in applicant's view.

In reply, the FTC urges the Commission to uphold division 2's requirement that a definition of "general rate increase and decrease" be included in the agreement. Unless there is some definition of this term in the agreement, the FTC reasons, carriers will be able to circumvent the statutory limits on voting by mislabeling rate proposals.[39]

We agree with the division that a definition of "general rate increases and decreases" should be included in the agreement so that it will be a complete instrument in and of itself. While failure to include an objective standard in the agreement with respect to this statutory exception would not create as great a potential for circumvention of the statutory standards as other more controversial term (*e.g.*, "practicably participate"), we think the need for definiteness and certainty in the agreement itself outweighs any potential administrative inconvenience.

We find that the above-quoted definition of "general rate increase" is appropriate for inclusion in the ports committee agreement and should be so included. While the Commission has not specifically defined "general rate decrease," it logically follows that "decrease" may be substituted for "increase" in the first clause of the definition to yield an appropriate definition of that term also.

Elimination of reference to section 5a of the act in articles providing for amendments to the agreement.—Articles VI and VII of the agreement, relating to amendments thereto, refer to approval by the ICC for the granting or continuation of the relief under the provisions "of Section 5b or, to the extent applicable,*** 5a of the Interstate Commerce Act ***". The division took issue with the ports committee's reference to section 5a of the act, noting that the agreement is limited to rail carriers and that section 5a is no longer applicable to carriers by railroad.[40] The division added:

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[39] NIT League takes no position on this issue.

[40] 355 I.C.C. at 235. Section 208 of the 4R Act amended section 5a of the Interstate Commerce Act (49 U.S.C. 5b) by making that section inapplicable to common carriers by railroad.

> Although article V authorizes consideration of interclass traffic matters there appears to be no need for approval under section 5a in light of the fact that no carriers of other modes are party to the proposed agreement.''

On appeal, the ports committee points out that if carriers of other classes are to become members of the ports committee, there must be amendments to the agreement pursuant to articles VI and VII. The references to section 5a is appropriate, it is argued, because if the ports committee agreement were amended to include carriers of other classes, the Commission would have to rely on both sections 5a and 5b to approve such amendments.

We agree with the division that references to section 5a of the act in this agreement are inappropriate and should be excised. The agreement, as presently constituted, relates exclusively to collective ratemaking between and among rail common carriers and is therefore governed by section 5b of the act. If and when the ports committee elects to open up the agreement to other modes (as members), the agreement can be amended, subject to Commission approval.

ULTIMATE FINDINGS

The division's finding that the proposed agreement warrants antitrust immunity, subject to certain terms and conditions, has not been challenged on appeal and is hereby affirmed. We find, however, that approval of the agreement as presently drafted cannot be granted until applicants amend the agreement to conform to those terms and conditions imposed by the division as modified in this decision. Therefore, in accordance with section 5b(6) of the act, and the interim approval previously granted applicants,[42] applicants will be accorded a reasonable period in which to file an amended agreement in harmony with the conclusions reached in this report.

We further find that because those issues relating to discussions of single- and joint-line rates (including the necessity of holding open ports committee meetings or the necessity for verbatim transcripts of ports committee deliberations) cannot be finally resolved at this

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[41] 355 I.C.C. at 235.

[42] Interim approval of this agreement (and others) was granted by order entered October 26, 1976, in Ex Parte No. 297 (Sub-No. 1). Although by terms of division 2's order (355 I.C.C. at 236), that interim approval was to have been terminated, that order was stayed by the timely filing of applicants administrative appeal.

time, it will be necessary to dispose of those issues in a separate subproceeding as further described in our order below.

It is ordered:

(1) The interim approval of the agreement granted by order entered October 26, 1976, in Ex Parte No. 297 (Sub-No. 1) is hereby terminated 30 days from the date of service of this report and order, unless within that time applicants file a revised agreement in conformity with the conclusions and terms and conditions for approval reached in this report and order.

(2) In a separate proceeding to be entitled Section 5b Application No. 4 (Sub-No. 1), Southern Ports Foreign Freight Committee—Agreement, applicants are hereby directed to file (and serve copies on the parties to this proceeding) an amended article I, section 2(d) of the agreement within 30 days of the service data of this report and order, setting forth with definiteness the nature and parameters of the right of members to discuss any matters coming before the ports committee. In addition, applicants are hereby directed to show cause why verbatim transcripts of all ports committee proceedings or, alternatively, open meetings should not be required. Any interested party may file responsive pleadings within 20 days thereafter. Applicants may file a rebuttal within 20 days of the last-filed reply, if any.

(3) This proceeding is discontinued.

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Ex Parte No. 334

CAR SERVICE COMPENSATION—BASIC PER DIEM CHARGES—FORMULA REVISION IN ACCORDANCE WITH THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

Decided August 1, 1977

Upon investigation, proposed formula for the computation of basic per diem charges amended in part and adopted by the Commission. Proceeding left open to facilitate further refinement.

Curtis H. Berg, W. Donald Boe, Jr., Charles W. Burkett, Martin Cassell, Paul A. Cunningham, John Daily, Louis T. Duerinck, R. S. M. Emrich III, Stuart F. Gassner, Richard M. Gleason, Michael P. Hearney, Charles R. Hrdlicka, Peter J. Hunter, Howard D. Koontz, R. K. Knowlton, Harry B. Latourette, William C. Leiper, Nicholas Manos, Joseph J. Nagle, Milton E. Nelson, Jr., Gordon E. Nevenschwander, C. George Niebank, Jr., C. Harold Peterson, Duncan B. Phillips, Charles C. Ruttberg, Jr., Albert B. Russ, Jr., C. Barry Schaefer, Scott W. Scully, Richard H. Stokes, James L. Tapley, and *Walter Treanor* for respondent railroads.

Joel T. Blalock, Don A. Boyd, Robert C. Caldwell, Robert L. Calhoun, John M. Cleary, John F. Donelan, Thomas D. Donis, Nicholas R. Falzone, Sam H. Flint, Howard Gould, William C. Harding, Richard Hardy, John E. Harvey, Kirk B. Johnson, John H. King, Rodman Kober, Eugene T. Liipfert, Martin M. Lucente, James R. Mann, H. D. Midkiff, Eugene J. Mielke, Edward M. Miller, Roy E. Olson, Robert B. Peabody, S. Howard Pittard, Harold M. Pockrose, Robert W. Polster, David Reichert, Arthur M. Ribe, Donald Rose, William R. Rubbert, Renee D. Rysdahl, David M. Schwartz, William M. Sheehan, Nelson E. Shineberger, Ernest Sigeti, Patricia A. Smith, William K. Smith, Harold E. Spencer, Stephen E. Strauss, Mary McQuire Voog, Michael L. Whitehead, Robert J. Williams, Edwin P. Wintle, and *Frederic L. Wood* for interested shippers and car leasing companies.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210 (4R Act) in order "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation services with greater efficiency, effectiveness, and economy."

Section 212 of the 4R Act amended section 1(14)(a) of the Interstate Commerce Act to read as follows:

> 1(14)(a) *It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order carry out such intent,* the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or oher vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, *shipper, or third party*), and (iii) the penalties or other sanctions for non-observance of such rules, regulations or practices. *In determining the rates of compensation* to be paid *for each type* of freight car, the Commission shall give consideration to *the transportation use of each type of freight car,* to the national level of ownership of each such type of freight cars, and to other factors affecting the adequacy of the national freight car supply. *Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor).* Such compensation may be increased by an incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest. [New or revised language is italicized.]

Section 212 of the 4R Act further requires the Commission to revise its rules, regulations and practices with respect to car service within 18 months of the February 5, 1976 enactment date.

Pursuant to section 212, a notice of proposed rulemaking and order (NPRO)[1] was served November 11, 1976, wherein the Commission proposed the adoption of a revised formula for the computation of basic per diem charges. The existing compensation formula, used in the calculation of basic per diem, was devised in *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 332 I.C.C. 176 (1968), hereinafter referred to as the *Burlington* case or docket No. 33145. This formula has been criticized as not accurately reflecting true ownership costs. The formula does not distinguish ownership cost between types of cars. The proposed revised formula was developed to more accurately represent the actual costs of ownership by (1) utilizing individual costs of ownership (repair costs, depreciation, et cetera) for 15 car types, and (2) by developing an improved cost of capital estimate by applying the overall debt-equity ratio as a weighting factor to the current debt costs and current equity costs, where costs of debt would be calculated from the interest rates and associated costs of new issues of funded debt, other than equipment obligations, and those of new issues of equipment obligations, and where the equity part of the cost of capital would be calculated by means of an interim procedure which will be superceded by the more substantive procedures that are anticipated as a result of proceedings relating to section 205 of the 4R Act.[2]

The NPRO also posed questions as to whether the Commission should address itself to contracts for the use of cars not owned by the carrier, whether there is a need for the prescription of penalties for nonobservance of the Commission's regulations and whether it is necessary for the Commission to devise a formula governing the compensation to be paid for the use of locomotives by a nonowning railroad. The NPRO also suggested that the rates of compensation to be determined in this proceeding for railroad-owned cars be applied to shipper and private car company equipment, except tank cars. Comments regarding the proper interpretation of "transportation use" as used in section 212 were also requested.

All common carriers by railroad subject to part I of the Interstate Commerce Act were made respondents to this proceeding, and all interested parties were invited to participate. An informal conference was held at the Commission on December 15, 1976, for the purpose of discussing the methodology for determining cost of capital. Initial statements were originally due by January 10, 1977, and statements in reply by January 31, 1977. However, upon consideration of petitions filed by the Association of American Railroads (AAR), extensions were granted to March 4, 1977, for the filing of initial statments in order to allow the AAR sufficient time to present a unified position. However, no such unified statement of the railroads was forthcoming. The railroads are cautioned that in future Commission proceedings where statutory time limitations are involved, petitions requesting extensions of time will be closely scrutinized, and will be only granted under unusual circumstances.

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[1] A copy of the notice of proposed rulemaking is set forth in appendix I hereto.

[2] Ex Parte No. 338, Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels, has been instituted pursuant to section 205 of the 4R Act and will among other things develop a cost of capital estimate.

In response to the NPRO, 40 initial and 26 reply statements were received. Appendix II lists the railroad respondents and interested parties who submitted statements and the abbreviations for them used in this report. Because of the large response, we cannot discuss each and every representation. However, all representations have been carefully reviewed and, as a result, the proposed formula is being modified in certain aspects. Appendix III sets forth the formula for car compensation as modified and adopted by the Commission.

The formula will be used to determine the rate of compensation (time and mileage) to be paid for each of 15 car types. Because the formula set forth in appendix III is based in part on the new Uniform System of Accounts and because that system will not be in effect until January 1, 1978, docket No. 36367, *Revision to the Uniform System of Accounts for Railroads*, served June 24, 1977, the effective date of the attached compensation formula, Rail Form H 8-76, will accordingly also be January 1, 1978. The alternative to adopt an interim car compensation formula to be applicable only to January 1, 1978 would be impracticable and impose needless administrative costs on the respondents. It should be noted that since expenses and statistics relating to various car types are not presently available, the formula, Rail Form H 8-76, cannot be translated into actual dollar and cent basic per diem charges until such data is collected and then reported in the annual report, form R-1, for the year 1978. Thus, while the car compensation formula will not be effective until the beginning of next year, we believe the formula as published and adopted by this Commission satisfies the intent of Congress and provides respondents with ample time to revise their procedures so as to begin to assemble the necessary information.

The 19-Road Group, which is composed of some significant creditor and debtor railroads, proposed an interim formula for the period 1978-81. This group believes that their interim formula will help promote the interest of the rail industry by not threatening the viability of marginal carriers such as Conrail and other carriers still in bankruptcy or threatened with bankruptcy. Conrail claims that its car-hire payments will be increased by approximately $22 million annually if the NPRO formula is implemented, while CRIP believes that its per diem debt will increased $1.6 million. CNW estimates that the proposed changes in the per diem formula will increase its per diem debit by a range of 15 to 30 percent.

We are cognizant of the fact that the revisions to the per diem formula herein will increase the rates of compensation. However, we conclude that this result was one of the factors taken into consideration when Congress enacted section 212 of the 4R Act with the intention to encourage the purchase, acquisition and efficient utilization of freight cars. Apparently, the 19-Road Group's compromise interim formula is an attempt to delay the full impact of the increases on Conrail for the period 1978-81. It should be noted that because the time lag in obtaining the data necessary, due to the mandated change in the Uniform System of Accounts, the new per diem charges cannot become effective until late in 1979. The full annual impact of the new charges will not be experienced until 1980. This is only 24 months prior to the time that the 19-Road Group would like the industry to be subject to the full effects.

BACKGROUND

Since the turn of the century, railroads have paid for the use of another railroad's freight cars on the basis of a per diem rate. The level of this rate, which was to be paid for each day that a railroad had possession of another railroad's car, was set by agreement between and among common carriers. From 1902 to 1964, a single daily rate applied to all per diem cars. Since 1964, a "multilevel" rate structure has been in effect. This rate structure provided for nine separate groups of per diem rates which vary depending upon the investment for the cars in each group, *Burlington* case, *supra* at 184-85.

Litigation over the level of car rental rates began in 1953 with the refusal of several small railroads to pay the same car rental rate that was then being paid and collected by all the other major railroads in the country. In 1955, the Commission issued an order declaring that the existing rates were not in excess of reasonable compensation.

Chicago, B. & Q. R. Co. v. *New York, S. & W. R. Co.*, 297 I.C.C. 291 (1955). This order was set aside by a three-judge court on the ground that the Commission had not adequately considered a proposal that a mileage factor be reflected in determining reasonable car rental. ***Boston & Maine Railroad*** v. ***United States***, 162 F. Supp. 289, 298 (D. Mass. 1958), appeal dismissed, 358 U.S. 68 (1958).

In 1959, the Commission reopened the prior proceeding. It also instituted a new proceeding under section 1(14)(a) of the Interstate Commerce Act for the purpose of prescribing the compensation to be paid for rental of freight cars (docket No. 33145). All railroads were made party to this new proceeding. Hearings were held, and the Commission's examiner issued his recommended report in December 1965.

On May 26, 1966, Congress amended section 1(14)(a) effective September 1, 1966. The amendments were the product of congressional concern, clearly stated in the Committee reports and legislative debates, that serious and recurrent freight car shortages were caused or aggravated by per diem rates which were so low that they discouraged car construction and encouraged a car-using railroad to hold foreign cars on its line rather than sending the cars back to the car-owning railroad.

In its report and order dated January 17, 1968, the Commission approved a new and different structure of car rental rates which eventually became effective September 1, 1970. The Commission's order requires that the per diem rate be calculated by adding (1) a rate per day and (2) a rate per mile times the miles run by that car (332 I.C.C. 231), and, instead of nine separate rates per day depending on the investment per car, the Commission prescribed rates per day for freight cars depending upon 21 value brackets and seven age groups, and rates per mile based on 21 value brackets. The Commission's report and order was appealed and sustained by the court. ***Union Pacific Railroad Company*** v. ***U.S.***, 300 F. Supp. 318, affirmed ***per curiam***, 396 U.S. 27, rehearing denied, 396 U.S. 1030. It is this basic per diem formula that this proceeding is modifying. Following is a discussion of the general issues raised by the NPRO and by the responses thereto.

CAR TYPES

The 4R Act requires that car compensation must be determined by car type. In the notice we proposed 14 specific and 1 general category of freight cars. All the railroads commenting on the specific car types selected approved of their use on an interim basis.

However, certain respondents recommended that the car types be made compatible with those in the proceeding in docket No. 36367, *Revision to the Uniform System of Accounts for Railroads*, and agreement was expressed with the statement of the AAR task force to the effect that as the results of experience in car repair, car utilization and car life become available, the car types should be reevaluated and perhaps expanded or contracted. CRIP offered no opposition to the proposed car types, but it did suggest a classification by values as in the *Burlington* case, *supra*.

Archer Daniels Midland Co. raised a question of a possible basic error in the NPRO under car types. The shipper points out that other cars in appendix B includes tank cars, yet tank cars are excluded from this proceeding. It is true that the catchall category of all other freight cars includes tank cars. However, these tank cars are railroad-owned equipment and account for only 1.7 percent of the total tank car fleet.

In view of the general agreement that the proposed categories of cars are valid, we believe that it is appropriate to adopt them for use in the formula. We assure the parties who have expressed concern on these matters that the adopted car types will be subject to such revision as experience indicates is required, and that the car types we prescribed in docket No. 36367 are those used in this proceeding. As for the suggestion that value groupings might be used in lieu of car types, we point out that although value groupings may to some extent serve to classify cars by type, they do not recognize the differences in repair costs by types encompassed in those value groupings. Therefore, such an approach would not fulfill the mandate of the 4R Act to determine rates of compensation to be paid for each car type fixed on the basis of the elements of ownership expense involved in owning and maintaining each type of freight car. (See table 4 car types.)

VALUE BRACKETS AND AGE GROUPINGS

Summary 4 (Car-Hire Rate Table) of the proposed formula uses $2,000 value brackets and 5-year age groupings. With the exceptions of CNW and CRIP, those participants commenting on these indicate general agreement that they need to be revised. CNW would retain the 5-year age groupings. CRIP sees little to be gained from certain of the changes suggested by other participants, but it does not actually oppose them.

ATSF, WP, and the 9-Road Group believe that basic per diem rates should be calculated on an individual car basis using actual age and investment. ATSF notes that this information is now available through the Universal Machine Language Equipment Register (UMLER file), and it avers that such an approach would more accurately compensate car owners for new investment as well as comport more fully with the congressional intent. WP suggests that this would eliminate the rewards now available from making minor adjustments in value in order to manipulate a car into the next higher bracket and getting the greater car-hire charges that result. WP contends that it would also eliminate the undercompensation to the car owner caused by the discounted value of payments received during the first half of the 5-year period, reducing the risk element, which would help to encourage investment in cars.

The 19-Road Group submitted arguments similar to the WP's but it supports use of $1,000 value brackets and actual age by year as does the SOO. BN/MOPAC argues that since the proposed rules provide for more refined specificity of per diem by car type and the UMLER file now makes individual car data available, it seems appropriate either to reduce the value brackets to $1,000 or to the specific car investment.

Using the evidence submitted in docket No. 33145, August 6, 1976, we have prepared the following table which shows the effect narrowing age groupings and value brackets has on daily per diem rates. Because of the time constraints of this proceeding, we have computed rates for only two age groupings and one value bracket. (See table 1.)

BEST DOCUMENT AVAILABLE

TABLE 1

Comparison of daily charges varying the age and value brackets

Line No.	Value brackets (1)	Age brackets (in years) 0-5 (2)	1 (3)	2 (4)	3 (5)	4 (6)	5 (7)	16-20 (8)	16 (9)	17 (10)	18 (11)	19 (12)	20 (13)
1	$15,001-$17,000	$6.23	$6.43	$6.30	$6.17	$6.04	$5.90	$4.25	$4.45	$4.32	$4.18	$4.05	$3.92
2	15,001- 16,000	5.92	6.11	5.98	5.86	5.74	5.62	4.07	4.25	4.13	4.00	3.88	3.76
3	15,001- 16,000	6.08	6.27	6.14	6.02	5.89	5.76	4.16	4.35	4.22	4.10	3.97	3.84
4	15,001- 16,000	6.23	6.43	6.30	6.17	6.04	5.90	4.25	4.45	4.32	4.18	4.05	3.92
5	16,001- 17,000	6.23	6.43	6.30	6.17	6.04	5.90	4.25	4.45	4.32	4.18	4.05	3.92
6	16,001- 17,000	6.39	6.59	6.46	6.32	6.18	6.05	4.34	4.55	4.42	4.28	4.14	4.00
7	16,001- 17,000	6.54	6.75	6.61	6.47	6.33	6.19	4.44	4.65	4.51	4.36	4.22	4.08

NOTES:

1. Assume a 336-day divisor and $437.40 as 50 percent of the average repair cost (from per diem submission, docket No. 33145, August 6, 1976).

2. Calculations are based on methods used in docket No. 31358—table A (Statistical and repair summary), table B (Summary of investment costs) and table C (Rate table).

3. Lines 2 and 5 use the lower limit of the value bracket (i.e., $15,001 and $16,001).

4. Lines 3 and 6 use the midpoint of the value bracket (i.e., $15,500 and $16,500).

5. Lines 4 and 7 use the upper limit of the value bracket (i.e., $16,000 and $17,000).

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This table verifies quantitatively much of what has been argued concerning the effect of narrowing age groupings and value brackets, and we are convinced that a revision of the proposed age groupings and value brackets is required to insure that car owners are compensated at a more appropriate level.

The value brackets will be narrowed to $1,000. The UMLER file, referred to earlier, contains individual car data including value, thus the information required to effect this change is now available.

We specifically reject the proposed use of actual investment instead of brackets. In the report 332 I.C.C. 176 at 214, it was stated that:

> Compensation to owners would most nearly be accomplished by measuring the car rental rate for each car according to its particular cost. Such a method would require rate schedules so complex as to defeat their purpose, however, and some groupings of cars is essential to a practicable system.

The proponents of use of actual investment have failed to show that the above-cited reasoning is no longer valid, and, therefore, the bracket method for car investment will be retained.

It has been alleged that the use of value brackets instead of actual investment results in an incentive to make minimal adjustments in value in order to manipulate cars into the next higher bracket, thus obtaining greater car-hire charges. We are not convinced that such "fudging" is widespread. Nonetheless, we would point out that by narrowing the value brackets to $1,000 the amoung gained by any manipulation will be minimized. Furthermore, although $1,000 value brackets will be used for car investment, the calculations in summaries 5 and 6 (Car-Hire Rate Tables) for time and mileage charges will be based on the midpoint of the bracket, *e.g.*, $15,500, $16,500, et cetera. The use of this base, as opposed to the upper or lower limit of the bracket, produces rates which reflect more accurately the investment within the bracket and lessens the incentive for value manipulations.

We have prepared the following table that compares the 5-year age grouping approach and the single year approach. The table shows the total per diem payment per car (based on rates from the immediately preceding table) that would result if a car were off-line 365 days a year. We realize that no car would be off-line this amount of time; we chose this figure to facilitate computation. The percentage amounts, wherein the significance of the table lies, would not be affected if a different number of days were to be used.

TABLE 2

Total per diem payment (assuming 365 days a year)

Base	0-5 years[1]	Addition of years 1-5[2]	Percentage difference	16-20 years[3]	Addition of years 16-20[4]	Percentage difference
$15,000	$10,804.00	$10,698.00	1.0	$7,427.75	$7,307.30	1.6
15,500	11,096.00	10,979.20	1.0	7,592.00	7,474.20	1.5
16,000	11,369.75	11,256.60	1.0	7,756.25	7,635.80	1.6
16,500	11,661.75	11,534.00	1.1	7,920.50	7,807.35	1.4
17,000	11,935.50	11,807.75	1.1	8,103.00	7,964.30	1.7

[1] Table 1, column 2 multiplied by 365 days multiplied by 5 years for each base.

[2] Table 1, sum of columns 3, 4, 5, 6, and 7 multiplied by 365 days for each base.

[3] Table 1, column 8 multiplied by 365 days multiplied by 5 years for each base.

[4] Table 1, sum of columns 9, 10, 11, 12, and 13 multiplied by 365 days for each base.

The figures in this table show that, use of 5-year age groupings results in some overstatement of rates. This overstatement is the result of the use of an average figure for interest and property taxes based on a book value less depreciation at the midpoint of the age grouping, as is shown by the following table.

TABLE 3

Total interest and property taxes

	0-5 years[1]	Addition of years 1-5[2]	Percentage difference	16-20 years[1]	Addition of years 16-20[2]	Percentage difference
Interest	$370.00	$364.00	1.6	$190.00	$184.00	3.2
Property taxes	57.90	56.96	1.6	29.75	28.79	3.2

[1] Interest and property taxes from latest per diem submission (August 6, 1976) multiplied by 5 years.

[2] Sum of individual year interest and property taxes for 5-year period.

Note: Calculations are based on methods used in docket No. 31358, table B, Summary of investment costs.

We believe that the above data clearly indicates that per diem rates arrived at through use of actual age by year will more accurately reflect ownership costs.

DEPRECIATION

One part of the capital cost component is the return of capital. This returns the original investment in the form of depression and salvage. The salvage value represents the value of the asset (i.e., the freight car) at the end of its useful life. Depreciation measures the decline in value on an annual basis down to the salvage value. At present, depreciation as used in calculating basic per diem is based on a straight line basis over 30 years at 3 percent to a salvage value of 10 percent. The use of a 30-year life for all car types has been in effect for a good many years, but for a number of years has been under question. The Commission has undertaken, from time to time, depreciation studies of railroad freight cars. By a notice to the parties, served February 14, 1977, the Commission in the instant proceeding indicated preliminary findings by car type of service lives (ranging from 14 to 44 years), depreciation rates, and salvage values (ranging from 5 to 25 percent of cost)[1]. In response to the NPRO and the above indicated notice to the parties, comments were received as to appropriate methods of depreciation.

BN/MOPAC states that their evaluation indicates that the average life of freight car equipment is now 27 years or less. They suggest that, subject to confirmation of other carriers and the Commission studies, the formula recognize a 27-year car life. The CNW wishes to continue the use of a 30-year car life until affirmative evidence to the contrary is developed. The CNW states that the Commission has not made available evidence that lives of plain boxcars are as short as 22 or 23 years; however, if evidence warrants service life of less than 30 years, then the car-hire formula should be changed to reflect same. It also suggests a transition period for recovery of cost for cars that have been depreciated too slowly.

The N&W alleges that the present assumption of a 30-year car life does not adequately recognize the risk of equipment obsolescence or the variances in physical life of car types. The N&W submits that the weighting of the lives by car types by the relative U.S. railroad ownership as of January 1, 1977, yields a weighted average of 24.9 years. It believes the present car-hire rate discourages freight car investment and causes cars to stay in service beyond their economic life, and the continued use of excessive lives in establishing car-hire rates will perpetuate inadequate and obsolete car fleets and be detrimental to fleet utilization.

The N&W suggests the use of a 20-year service life for each of the car types in the per diem formula. It indicates that the salvage factors in the Commission's preliminary findings were artificially inflated due to the surge in scrap prices, and it suggests that the salvage factor should be determined by deflating the current salvage amounts to the same price level reflected at the time of the original purchase of the freight car.

The SP believes the present 30-year life is unrealisitically long, and should be adjusted now to reflect a 27-year life with a corresponding 3.33-percent depreciation rate. It does not believe a salvage factor in excess of 10 percent as shown in the Commission's preliminary study of February 14, 1977 is realistic.

The 9-Road Group recommends using a 27-year life with a 10 percent salvage factor on an interim basis, pending further study by the Commission. The 19-Road Group similarly believes the present 30-year car life overstates the actual car life. They also are of the opinion that the railroads presently lack the capabilities to determine car life by car type, but agree that this approach would more accurately compensate the car owner. They recommend the use of a 27-year car life during an interim period. They also state that the average depreciation rate for the national fleet in 1974 was 3.34 percent representing a life of 26.9 years.

In reply, the CNW referred to the SP's statement that use of salvage value in excess of 10 percent when computing depreciation rates for per diem purposes is unrealistic. The CNW believes that during normal periods of scrap demand, and consequent higher scrap prices, even higher scrap values would be achieved. As a result, it argues that a 10-percent salvage factor must be regarded as unrealistically low in all circumstances.

Also replying, CRIP feels that a 30-year car life overstates the actual car life. It supports a 27-year life with a 10-percent salvage factor.

We find no merit to respondents' proposals since they do not meet the critieria established by Congress to determine ownership costs by car type. The consensus of most of the railroads is that a 30-year car service life is unrealistically long, but they do not have the capability to determine the appropriate life by car type. We reject the use of a single composite depreciation rate applicable for all car types. Depreciation rates should vary by the actual service lives of the different types of railroad freight cars. Accordingly, we will use the annual depreciation rates shown in table 4, for each of the designed car types based on the average service life and salvage factor as indicated. The computation of service lives and salvage values were made by the Depreciation Branch of the Bureau of Accounts, as further explained in appendix IV.

TABLE 4

Car Service Compensation

SERVICE LIFE AND SALVAGE ANALYSIS FINDINGS
AS OF JUNE 6, 1977

Description	Service life years	Salvage percent	Annual rate percent
Plain boxcars—40 feet	24	22	3.25
Plain boxcars—50 feet and longer	25	19	3.24
Equipped boxcars	26	17	3.19
Plain gondola cars	27	22	2.89
Equipped gondola cars	34	14	2.53
Covered hopper cars	29	17	2.86
Open top hopper cars—general service	23	23	3.35
Open top hopper cars—special service	38	23	2.03
Refrigerator cars—nonmechanical	25	11	3.56
Refrigerator cars—mechanical	26	12	3.38
Flatcars—TOFC/COFC	29	18	2.83
Flatcars—multlevel	25	11	3.56
Flatcars—general service	33	22	2.36
Flatcars—other	37	18	2.22
All other freight cars (excluding cabooses)	30	17	2.77

The selected service life for each car type was analyzed on the basis of using the actuarial method as documented and published by the Commission and shown in appendix IV. In the development of the salvage percentages for each car type, consideration was given to past and future salvage. That is, salvage received from the retirements of all vintages of cars used in the analysis of average service life was considered together with the estimated salvage to be received from future retirements of all cars.

REPAIR COSTS–3-YEAR MOVING AVERAGE

Repair costs have been generally recognized by the Commission and courts as the largest single element of car ownership costs. ***Burlington*** case, ***supra*** at 188-89; ***Boston & Maine Railroad*** v. ***United States, supra*** at 295. Consequently, an accurate determination of car repair costs is paramount in arriving at per diem rates adequate to insure that car owners are properly compensated. Section 212 of the 4R Act directs the Commission to give due consideration to current costs of repairs in determining car-hire compensation. The formula utilizes the concept of 3-year moving average repair cost. Under this method the repair cost figure for the current year would be computed by averaging the actual costs of repair for the latest year for which data is available and the immediately preceding 2 years. This was done to absorb temporary fluctuation in economic conditions while reflecting longer term changes in utilization and costs.

The proposed means of determining average repair cost generated considerable response from the participants. All those responding were basically favorably disposed toward the use of the 3-year moving average. Much concern was expressed, however, that this approach by itself fails to take into account the effects of inflation. An example provided by both ATSF and SP is that of car-hire rates that became effective April 1, 1977, which were based on the average of repair costs for 1973, 1974, and 1975. Put in its simplest terms their argument is that the 1977 car repair dollar will not buy as much as it would in the averaged period. The carriers are of the view that the continuing inflationary conditions require that the 3-year average be indexed in order that the owner may be compensated at a level closer to the costs actually being experienced.

The proponents of indexing have suggested a number of methods by which it may be accomplished. BN/MOPAC, WP, and the 9-Road Group would index the 3-year average to reflect the level of cost of labor and materials in the most recent of the 3 years averaged. The 19-Road Group would use the same method but suggests that it be phased in over a 4-year period to avoid disruptions. ATSF and SP would index the 3-year moving average to the most current level available by use of AAR compiled indexes, which SP notes are available on a quarterly basis and are accepted in the industry as being reliable. All agree that the labor and materials factors of car repair costs should be given equal weight until such time as more accurate information is available.

The carriers have presented the argument that indexing, in addition to use of a 3-year moving average, is required in order to insure a more realistic car repair cost figure. We find it a convincing one. Rates arrived at through use of historical data which fail to take ongoing inflation consideration will invariably fail to provide complete compensation.

To insure that the car owner is reimbursed in an amount nearest to what it will cost to repair a car and thereby to satisfy the intent of the Congress is manifested in section 212 of the 4R Act, we will modify the proposed formula to provide for indexing. Of the specific methods of indexing proposed, we believe that proposed by ATSF and SP which would index the 3-year moving average to the most current level through use of AAR indexes is the most desirable. For example the per diem rate made effective May 1, 1975, was based on 1971-73 average actual repair expenditures of $719.86 annually. Actual repair cost for 1975 was $926.58 per car, resulting in a deficiency of $206.72 per car. If the indexing method articulated by ATSF was used, i.e., if the $719.86 average car repair cost figure had been indexed to the most current level, the average repair cost figure, for purposes of computing car-hire rates, would have been $881.79, reducing the deficiency to only $44.79. The method proposed by the 19-Road Group, indexing to the level of cost in the last of the 3 years averaged, would have increased the average car repair cost figure to $733.87, a deficiency of $192.71.

Clearly, the suggestion of the 19-Road Group that the 3-year average be indexed based on indexes for the last of the 3 years averaged would not reflect current cost as well. As for the 19-Road Group's additional suggestion that indexing be phased in, that would unnecessarily delay bringing per diem charges more in line with current costs. We are not convinced that the implementation of indexing will require any such adjustment period.

Use of the 3-year moving average in the computation of car-hire rates under the proposed formula cannot be affected until the new system of accounts (docket No. 36367, *Revision to the Uniform System of Accounts for Railroads)* has been in use for at least 3 years. In the interim we propose to let the first year "stand on its own," in the second year to use a 2-year average, and the third year, and thereafter, a 3-year moving average. CRIP contends that the present 3-year rolling base should be continued, with adjustments, so as to avoid the "surge upward" in rates that allegedly results from the temporary abandonment of averaging. In order to meet the requirement of the 4R Act that compensation be determined by car type, this would require imputing relative differences by type in actual car repair costs from the first 2 years they are available, i.e., the first and second years the new system of accounts is in effect, to previous years. We are not convinced that this would satisfy the sprit of the 4R Act, inasmuch as it is not certain that the imputed cost differences would have a significant correlation to the actual costs differences in those years. Although some "surge" in rates may occur as a result of our proposed method, the rates will not be unreasonable, and, therefore, no undue prejudice to any carriers will result.

ALLOCATION FACTORS

In the *Burlington* case, *supra*, factors, or ratios, were developed for the allocation of expenses within the car-hire compensation formula there devised. These factors were based on the results of a special per diem study conducted by the Commission in conjunction with the *Burlington* case, *supra*. In the NPRO we stated the intent to use these factors, with some modification, in the proposed formula. We indicated that these factors had produced acceptable results over the years, and we noted that by utilizing them in the proposed formula, the need for a special study would be eliminated, at least for the present.

Several of the railroads have offered comment on the proposed use of the allocation factors developed in the *Burlington* case, *supra*. All contend that these factors are somewhat inaccurate because of the amount of time that has passed and the extent to which operating conditions have changed since the special per diem study upon which they are based was conducted, and that a new study to provide a basis for updating these factors is in order. Much input is directed toward specific areas believed to be especially in need of revision, and in this regard the report of the AAR task force is quoted at length. Nonetheless, these respondents concede that the present allocation factors may be used on an interim basis.

We agree with respondents that a review of the present allocation factors is warranted. In view of the time limitations imposed by the 4R Act, wherein this proceeding was mandated, it was not possible to conduct the studies required for a reevaluation of the allocation factors prior to the putting forth of the proposed formulas. We are covinced, nonetheless, that notwithstanding that they may be to some extent inaccurate in certain respects, the present allocation factors are sufficiently valid so as to provide a rational basis for the distribution of costs within the proposed formula, and that on an interim basis, as respondents concede, they will be adequate. Respondents can rest assured, however, that a review of the allocation factors will be a matter of substantial priority for this Commission, and that necessary studies for reevaluation and updating will be undertaken.

COST OF CAPITAL

The Commission in its notice of proposed rulemaking served November 11, 1976, stated:

> The 4R Act requires due consideration be given to the current cost of capital. The cost of capital is recognized as adequate compensation to the suppliers of capital, debt and equity, for their respective contribution to the overall capital structure of the industry. The concept of current cost of capital emphasizes the cost associated with new infusions of capital from these sources. An overall cost of capital implies its application to all investments made by the industry and not solely to freight cars. For this reason, all new sources of capital are considered and the overall debt-equity ratio is applied as a weighting factor for the debt costs and equity costs to arrive at the overall cost of capital.
>
> Cost of debt is proposed to be developed from the interest rates and associated costs of new issues of funded debt, other than equipment obligations, and those of newly issued equipment obligations. Both these elements are weighted by their relative contributions to give an overall cost of new debt.
>
> The procedures and methodologies for developing the equity portion of the cost of capital will be a major issue in the proceeding to be instituted by this Commission relative to section 205 of the 4R Act. The intent here is not to prejudge the outcome of the rulemaking proceeding mandated by section 205, nor to duplicate the effort required. Due to the fact that the section 205 rulemaking will not be administratively final prior to the conclusion of this proceeding, an interim method of developing cost of equity will be utilized. Upon finalization of procedures under section 205, it is our intent that cost of equity calculation under section 212 will be brought into conformance with methodology and procedure set forth in section 205.
>
> The interim procedure to develop the cost of equity is the discounted cash flow (DCF) approach which uses market value as its criterion. By this procedure the major cost element associated with common stock ownership is looked at from the point of view of the stockholder. The corporation must generate earnings that will provide its dividend yield rate to the stockholder plus a capital gains appreaciation in the market value of the stock. Realizing the volatility of market price, this latter element is perceived as a function of the organization's historical growth trend as expressed by the changes in its common stock market price expressed in constant dollars. The railroads are unique in that during the past 18 years using this test, they have experienced an average negative growth per year. The difference between this decline and the change in some standard over the same period would give a rate that, if substituted for the growth factor cited above, would, in theory, achieve a stable capital flow. For purposes of this interim procedure, the standard for comparison is given as the change in common stock market prices (expressed in the same constant dollars over the same period) of a composite of corporation statistics published in "Moody's Transportation Manual." The cost of equity capital based on common stock is the same for retained earnings except for the exclusion of any floatation costs that may be involved.

The remaining element in determining the weighted cost of equity is the preferred stock. Its costs are fixed similar to debt, but, because it is technically an equity element, it is included in the weighted cost of equity.

The final step is to weight the cost of debt and cost of equity. This is accomplished using the long-term debt to equity ratio, and applying it to the respective debt and equity elements of the cost of capital.

Sources of data from which to calculate the current cost of capital utilizing the above procedure are:

A. *Cost of Debt*

1. Interest on new issues of funded debt—"Transport Statistics in the United States." (T.S.), table 148, for total column.

2. Interest on equipment obligation (not including conditional or deferred payment contracts)—T.S., table 148, Equipment Obligations column.

3. Interest on equipment obligations, conditional or deferred payment contracts—T.S., table 146A, Amount Obligations Issued and Average Rate of Interest (percent) columns.

4. Weighting factors—weighted on basis of dollar values of each item cited above.

B. *Cost of Equity*

1. Dividend yield rate—"Moody's Transportation Manual," Analytical Survey of the Railroads (Moody's), Common Stock Dividend Yield percent.

2. Adjustment to preincome tax-maximum corporate Federal income tax is assumed to be 48 percent.

3. Market price of common railroad stock—Moody's, Railroad Common Stocks—End-of-Month Averages, Market Price—Weighted Average—dollars per share.

4. Market price of common composite stock—Moody's, Common Stock Prices, Earnings, Dividends, Yields, and Price-Earnings Ratios—Annual Averages, composite column.

5. Average yearly percent change—based on trended change over period, expressed as a percent and averaged for the number of years.

6. Preferred stock cost—preferred dividend rate.

(a) Preferred dividends—T.S., table 126.

(b) Preferred Stock—T.S., table 158.

7. Weighting factor—rates weighted by dollars of new issues of preferred stock to dollars of total shareholders equity.

(a) Amount of new issues of preferred stock—T.S., table 146, section B, Preferred column.

(b) Shareholders equity—T.S., table 158.

C. Overall Weighting Factor—long term debt to equity ratio—T.S., table 158.

All parties in attendance at the informal conference held at the Commission on December 15, 1976, were informed that the sample numbers used to explain the procedure had not been validated, and the primary reason for the conference was to explain the procedure, not to calculate the appropriate cost of capital. For this reason, the following discussion will be confined to addressing issues raised that relate to theorectical principles and methodologies.

An initial question which must be answered is whether the 4R Act specifically mandates a change in the method of calculating a cost of capital. Initial and reply statements by SOO and CRIP argue that the 4R Act does not require changing the rate of return included in the current formula. The reply statement of CRIP indicates that the current formula gives due consideration to the cost of capital. Two other reply statements by BN/MOPAC and the SP state that the language of the 4R Act specifically mandates a change in the methodology of developing cost of capital.

It must be presumed that the 4R Act was enacted with knowledge of the existing approach of handling the fair rate of return or cost of capital. With this knowledge, Congress specifically stated that " *** due consideration ***" must be given to " *** current cost of capital ***." We recognize that due consideration implies a systematic approach that give cognizance to the relevant issues and includes current cost of capital as a major item in the computation of per diem rates. To the extent that the existing per diem formula does not reflect a systematic method approaching the state of the art in cost of capital calculation, then its revision is mandated by law. The issue is not whether the rates will increase or decrease; but rather, that the method of computation include the element of current cost of capital as a major constituent. Based on the methods of calculating the cost of capital in the existing per diem formula, we conclude the 4R Act does mandate a change in the method of computation to account for the current cost of capital.

Several railroads advocate the necessity of having per diem rates include the full cost of capital. SOO indicates that per diem should only return the cost to the owning road and no more. BN/MOPAC points out that per diem rates set below full economic cost acts as a cross-subsidization of debtor roads by the creditor roads. By the same token, BN/MOPAC indicates that per diem rates set above cost levels act as excessive transfers of funds from debtors to creditors.

These railroad respondents point out that the rate of return attached to per diem should not exceed that available from freight revenues. In the proposed rulemaking for this proceeding, served November 11, 1976, we recognized the interrelationship of per diem to freight revenue in setting the cost of capital calculation for per diem rates as an interim procedure.

Certain railroads present computations designed to show that current per diem rates generate rates of return that are unrealistically high. They support this argument by pointing to recent drops in car-hire rates by Rail Box as an indication of an excessive rate of return built into the existing formula. Furthermore, they point out the proliferation of small roads acting as point of entry for outside investors to bring cars on-line. It is argued that this phenomena is a direct result of high rates of return on basic per diem charges. The SP argues that the proliferation of small roads functioning as major car suppliers is the result of the combined effects of investment in cars subject to incentive per diem and the tax benefits that can be passed back to the private investor, as well as the unique characteristics of the small road remote from rail junctions who acts as an originator of car loads. The SP continues by discounting the cost of capital calculations based on such car supplying firms as Trailer Train Corp. because of the difference in their costs of capital from railorads based on debt guarantees by the subscribing railroads. Other railroad respondents point to flaws in evaluating only a limited aspect of the capital structure of the railroads when developing these ultra high rates of return from the current per diem formula. The reliance of discounting the cash flow involved in the cash down payment is cited as a major shortcoming of such calculations. It is indicated that higher per diem rates caused by high rates of return will increase the operating expenses of debtor roads without increasing their revenues. This assumed to have a devastating effect on debtor roads. Also it is argued that higher per diem rates will cause an aggravation of a purported car surplus as a result of incentives to invest.

The arguments for raising the per diem rates imply the basic assumption that the existing formula does not return the full costs of ownership, including the cost of capital, beyond debt interest. Our opinion is that, regardless of whether the existing rates cover the cost of capital or not, the existing methodology for arriving at the interest rate to be used as a rate of return does not comply with the 4R Act as giving due consideration to the current cost of capital. The onus of developing a formula to provide this consideration falls on the Commission.

The question of whether the economic cost element of cost of capital should be included in per diem rate computations is not optional but is mandated by law. Although the language of the law says the goal of section 212 is to encourage investment in cars, this encouragement is not be be applied through additional incentives, but through the removal of disincentives generated by rates that fail to include the full economic costs of ownership. Using full costs would negate any cross-subsidization of debtor roads by creditor roads that would exist if per diem rates did not include the full costs of ownership.

We agree that per diem rates should not generate a rate of return greater than that generally available through freight revenues. For this reason, the cost of capital methodology for per diem rates is subject to such modification as may become necessary because of findings that may be made under other sections of the 4R Act.

Arguments purporting unrealistically high rates of return from the existing formula appear to rely on (1) applying the full return and cash flow on only the cash outlay involved in the down payment for cars, (2) including the effects of cars subject to the provisions of incentive per diem, or (3) considering financial institutions or car suppliers, such as Trailer Train Corp. whose debt is guaranteed by participating railroads and who consequently have lower real costs of capital than railroads. The Commission interprets the 4R Act as requiring the current cost of the overall capital structure. This negates reliance on the debt instruments and direct cash outlays specific to a given car, but requires consideration of the entire capital structure from a current point of view.

The small roads acting as car providers to the system can do so not solely because of per diem rates, but because they are able to pass through to the investor, who has a lower cost of capital, the tax benefits of ownership and the additional investment incentives contained in the incentive per diem provisions. These roads exist in a unique situation which, because of their operating characteristics segregates them from the remainder of the railroad industry and makes them attractive to third party investors looking for tax shelters.

The question of the debilitating effect on debtor roads of an increase in per diem rates caused by altering the cost of capital is a real issue. We are charged with considering the overall financial health of the entire industry, debtor as well as creditor roads. If altering the existing per diem formula to account for the current costs of capital causes higher per diem rates, this will cause greater outflow of funds without the concomitant increases in revenues for debtor roads. However, we find no authority in the 4R Act for dictating that the per diem process be conditioned on the ability of debtor roads to absorb increased costs. To the contrary, per diem is legally mandated to be fully compensatory including the current cost of capital.

Basic per diem is only one factor to be considered by a carrier when deciding on whether or not to purchase additional cars. Of at least equal significance is the railroads' anticipation of shipper demand for cars. The revision of basic per diem is designed to remove any disincentives to invest in cars, that may have been built into the old formula through failure to include all cost associated with the ownership of cars.

Recognizing the mandate of the 4R Act, we conclude that any increases in the per diem rate caused by the inclusion of the current cost of capital as an economic cost element is acceptable to be applied to all roads subject to per diem.

An issue raised by the 19-Road Group is whether an arbitrary rate reflecting the debtor roads ability to pay be applied in lieu of a bona fide cost of capital. The 19-Road Group agrees on an approach to per diem which they feel will cover all ownership costs "except perhaps the costs of capital." They suggest an arbitrary return of 8 percent be used in the formula in lieu of a calculated cost of capital, and that this 8 percent is the most that debtor roads can afford to pay. CRIP indicates that it cannot afford to pay higher per diem rates than now exist and that any proposed increase in per diem rates must be moderated by the ability of debtor roads to pay. Other railroads in reply argue that the proposal of the 19-Road Group fails to meet the statutory requirements of the 4R Act in covering the full costs of ownership, since that ability to pay was not stated by the 4R Act as being the preferential determinant of rate levels.

We see the importance of agreement within the industry, or at least major segments within the industry, for the efficient operation of economic regulation of transportation. By the same token, this agreement is not seen as an overriding constraint to be imposed on the regulatory process. This rejection of an agreed upon proposal takes on increased importance when the proposal agreed upon by a segment of the industry is contrary to the congressional mandate expressed in the law. The 4R Act requires per diem rates to fully compensate all cost elements, including the current cost of capital. A proposal, whether supported by many carriers or not, is suspect if it presents an arbitrary interest rate with no evidential support for the level of cost compsnsation embodied in the rate.

Likewise, the ability to pay is, in many contexts, an overriding constraint, but the requirement for the per diem rate to fully compensate all relevant cost elements is basic to this issue. To that end, per diem is not permitted to function as a tool for cross-subsidizing the railroad industry.

In this light, we reject the apprach of setting an arbitrary rate of return to represent the cost of capital without an adequate method of insuring that the chosen rate truly reflects the actual cost involved. We, therefore, conclude that a detailed rationale and methodology is necessary to arrive at an appropriate current cost of capital.

A few respondent railroads raise the question whether cost of capital should be computed on the basis of a given class of assets or on the firm's overall capital structure. It was indicated that the cost of capital represents the market's evaluation of the earning power and riskiness of an investment and since earning power coming from freight revenue and cars are the least risky railroad investment, the overall cost of capital is not appropriate. These respondents argue that the capital costs associated with a given asset, especially cars in this case, can be developed and should be used for per diem rate determination.

The ATSF in reply indicates that a cost of debt and equity capital cannot be assigned among individual classes of assets, if all these assets are necessary to support the rail transportation function. It points out that the cost of capital concept must be approached from the perspective of the investor, debt holder, and stockholder.

N&W states that cars may have a lower risk from the standpoint of the lender who maintains ownership rights over the equipment, but from the standpoint of the railroad a dollar of car debt is not easier to pay than a dollar of other debt. Additionally, it says that facts do not sustain the assertion of freight car ownership being less risky for the railroad.

BN/MOPAC argues that a fair return be based on the price of money as determined in the market place for the firm. Individual investments failing to meet this level drive up the overall rate for the firm. It continues by showing that the decision to invest in a particular asset is based on the overall current cost of capital of the firm, not the cost of financing that particular asset. It indicates that no debt can be issued without an equity base to support the prior claims of creditors. By the same token, increases in debt financing increase the risk to investors because the debt must be serviced in bad times as well as in good, thus the financing method must be chosen based on maintaining a sound capital structure. Debt financing of cars appears a low risk to the creditors because of their ability to reposses the car, but high risk for investors in that these assets are not available to support the general credit of the firm. BN/MOPAC continues by showing that since a car cannot generate revenue without the operation of the railroad, and since the investor makes his committment of funds available to the corporation and not to a particular asset, this requires use of a corporate cost of capital in lieu of a cost of capital of a particular asset. It reinforces this argument by showing that the risk of a particular asset is set by its ability to generate revenue, but since the revenue generation of any car is intimately connected with the overall operation of the railroad, the overall corporate risk factor and concomitant cost of capital is the only applicable rate that should be applied to cars or any other asset directly connected to the rail transportation function.

We conclude that the cost of capital determination for per diem rates should be that cost of capital applicable to the overall firm and aggregated into an average for the entire industry by the methods later herein discussed, as opposed to a contrived cost to be assigned to a single class of operational assets.

The current cost of capital is considered as the market's recognition of risk associated with a firm and its anticipated revenue generation. The capital pool of funds available to the firm represents all its cash, equity, investment, and debt funds, regardless of type of financing, available for acquiring assets. This pool of funds has a weighted cost that is a rate of return expressing this market recognition of firm risk and expected income. To the degree that some assets are not related to the operation of the firm, such an investment in commercial paper, bonds, or stock, a separate cost of capital can be developed based on the fact that these assets generate income and have risk separate from the normal operations of the firm. These assets will continue generating income regardless of the financial conditions of the firm. On the other hand, those assets intimately related to a firm's operations, such as cars, locomotives, tracks, and yards and terminals, cannot be segregated from the whole of the firm. If the firm were to stop hauling freight, these assets would cease to generate revenue. For this reason and because they can be considered as being financed from this corporate pool of funds comprised of all equity sources and debt financing instruments currently used by the corporation, the asset is considered as having the same risk, and, consequently, the same cost of capital as the overall corporation.

The decision to acquire an asset generally hinges on the firms analysis of the asset's ability to generate a rate of return that equals or exceeds the firm's cost of capital. Since the method of financing was included as a weighted element in the cost of capital, the decision of how to finance the asset is separated from the decision to acquire or not to acquire the asset. Once the analysis has revealed that the asset will indeed return at least the firm's cost of capital and the decision to acquire the asset is made, analysis now turns to the decision of how to finance the asset. This decision considers the existing equity base available to support additional debt financing as well as the relative costs and commitment required of the firm under various financing arrangements. The fact that a particular asset may hold less risk for a creditor who retains ownership rights to the equipment, with the ability to repossess the asset in event of default, only enters the firms decision process in the lower debt interest rate resulting from the creditor's greater security interest in the asset. From the firm's standpoint, the risk of the operational asset remains that of the overall firm's operation.

The next area of discussion concerns what general method of cost of capital determination should be applied. The statements submitted by the 9-Road Group and WP as well BN/MOPAC indicate a preference for a comprable earnings (CE) approach. The CE approach uses opportunity costs in developing a cost of capital measured by the return that could be made on the same money invested in the next best alternative investment. BN/MOPAC suggests developing a cost of capital by both the CE approach and the DCF (discounted cash flow) approach, which is also referred to as the market value method. Its calculations give a cost of capital by the CE approach of from 15.25 to 15.75 percent, while by the DCF approach, this range extends from 14.5 to 15.0 percent. The 9-Road Group and WP indicate that the DCF approach yields highly variable and speculative results.

N&W suggest using the earnings price ratio of railroads as the indicator of an industry cost of capital. Using a sample of information on railroads drawn from the February 11, 1977, issue of the "Wall Street Journal," produces an industry cost of capital based on these earnings price ratios of no less than 14 percent.

SP discusses the fact that relating the book value of a railroad to its earnings fails to account for rail stocks selling below book value because investors' hopes are depressed by low earnings, not because assets are overvalued.

BN/MOPC's indicates that the key element in using the DCF approach is the comparison of the present value of the cash flow related to the investment with the purchase price to establish whether or not the investment should be made. CNW, SOU, and SOO developed calculations utilizing a DCF approach. BN/MOPAC criticizes their calculations by stating that these three statements disregarded the full principle of car investment, choosing only to use the cash outlay relating to the initial down payment in the DCF calculation. Furthermore BN/MOPAC points out that in using the cash flows, both inflows and outflows over the life of the investment, resulting because a decision to acquire a given asset has been made, requires one of three assumptions in order to compare the asset investment's internal rate of return with the average cost of capital. These three assumptions are: (1) that all possible investments being considered have the equivalent risk, (2) all projects have the same risk as the firm's average risk, or (3) the undertaking of a project or acquisition of an asset will not alter the overall risk of the firm.

BN/MOPAC and the SP indicate that the basic methodology in the proposed rulemaking was generally acceptable providing it remained only an interim procedure.

In applying the cost of capital concept to any firm, the subject firm would calculate its average current cost of capital using either the CE or DCF procedure and use the resulting percent as a standard against which to compare individual projects, investment options, or possible asset acquisitions. The asset must generate a return at least equivalent to the firm's average current cost of capital in order to be undertaken. The cost of capital becomes the "hurdle rate" that each investment's rate of return must meet or exceed. This analytical process takes place in any well managed firm, regardless of whether or not it is regulated. Hence, in implementing the congressional mandate it is necessary to clarify the procedures by which the cost of capital is included in per diem rates.

The comparable earnings, or comparative earnings, approach to finding the equity component of the cost of capital to be used in investment decisions requires evaluation of a wide range of firms from various industries with comparable risk characteristics to the subject firm from an investor's standpoint. Once these firms have been selected, their earnings, profits, and rates of return are analyzed to arrive at a rate of return that represents the cost of capital for the subject firm. Difficulties in this approach involve the subjectivity of risk determination, differing results when individual firms are substituted in the analysis, the fact that detailed mathematical and statistical techniques are required to arrive at the results, and difficulty in obtaining much of the raw data.

We recognize the CE approach as being more sophisticated, but linked to this sophistication is a complicated information gathering and analysis requirement that would unnecessarily burden an interim procedure to arrive at results close to those found with the DCF approach.

The alternative approach develops the equity element of cost of capital from the dividends the investor expects to receive and the appreciation in the market price of the stock that the investor expects to realize when selling the share of stock. For stable or growing firms, a historical trend over a period of time is sufficient to project the expected growth rates of both the dividends and market appreciation of the subject firm's stock.

This method of developing the equity element of cost of capital is frequently referred to as the market value method, but to remain consistent with terminology used in the proposed rulemaking it shall be referred to hereinafter under the general name of DCF approach.

The computation of the cost of debt element for either the CE or DCF approach remains primarily that of weighting the current debt interest rate as debt contributes to the current capital structure.

The procedure outlined in the proposed rulemaking was designed to generally following a DCF approach. This method was chosen for its ease of calculation and for its wide availability of data from public sources, thus enabling anyone to understand, follow, and, if necessary, make the calculations.

Remaining internally consistent, for purposes of economic regulation, an industrywide cost of capital can be developed following these procedures, and can be injected into the per diem rate structure to insure that the return on cars covers the minimum industry hurdle rate or cost of capital to be applied in any investment decision. This is not to say that the resulting rate would be the rate experienced by individual firms, but it would represent an aggregated average that is representative of a fair return for the entire industry. Recognizing the relative public availability of data, and ease of general understanding of this procedure, we hereby adopt the general DCF procedure of calculating the cost of capital for per diem rates.

General Mills, Inc., recommends that the cost of capital should be tied to some index to trigger timely changes, based on changes in interest rates, inflation, and any other factors directly impinging on this rate.

As stated in the notice of proposed rulemaking, the burden of notifying the Commission when such calculations indicate a need for revision of the rates may appropriately be placed on those parties subject to the per diem rules. Based on the functioning of this mechanism, it is not necessary to apply a separate triggering index to the calculation of only the cost of capital. For this reason, we reject the proposal to tie cost of capital calculations and update to some extraneous index. We, therefore, conclude that updates to the current cost of capital will be based on actual changes in the component costs of capital and the remainder of per diem rates will be adjusted based on petition by the parties to per diem proceedings.

As to the issue of whether cost of capital should be computed on a current or imbedded basis, the N&W, SSI and Allied call for exclusive use of current costs. Both N&W, and SSI cite the 4R Act's inclusion of an emphasis on the words current cost of capital as dictating that imbedded costs be disregarded. The N&W and SSI also argue that inclusion of imbedded debt costs results in an unrealistically low cost of capital, far below that which prudent management would use in sound investment decisions. CRIP points out that the proposed rulemaking correctly used the nominal interest rate of new debt and the amount of new debt issues in developing the debt element of cost of capital.

BN/MOPAC points out that the 4R Act requires due consideration, not exclusive consideration, of current cost of capital. This thought is further supported by the statement of the 9-Road Group and WP, and SP, which also argues that all debt, old and new, and all equity supports all assets, therefore, imbedded costs must be included. The 9-Road Group and WP further state that only through consideration of imbedded debt can the contractual nature of existing debt be recognized.

SOU points out that current equipment debt cost can fluctuate based on the current interest rates. Such a cost of debt could be overstated at any given time. On the other hand, it continues, the overall or imbedded debt rates reflect such unrelated items as mortgage debt that extends for longer periods at lower rates.

BN/MOPAC argues that exclusive reliance on a current cost of debt would recover a greater amount of revenue than actual cost in times of increasing current cost of debt and less than actual cost in times of decreasing current cost of debt. The CNW argues for retention of the imbedded cost of debt component as utilized in the *Burlington* case, *supra.* It states that since incremental debt is added to an existing debt base, the true cost of debt becomes that cost entailed if the entire debt structure were to be refinanced under current market conditions. It argues that interest and debt repayment schedules compensate for lenders' anticipation of inflation, therefore, it is not necessary to compensate for inflation by using exclusively the current cost associated with the cost of capital.

It is our belief that managers concerned with asset acquisition generally analyze the projected rate of return from the particular asset compared to the overall cost of capital associated with the new infusions of debt and equity capital planned during the time period in which an asset is to be acquired. Were we to adopt the overall imbedded cost of capital, we would be including a massive amount of old, very low interest, extremely long-term debt instruments. The resulting cost of capital would be unrealistically low and would fail to comply with either the language or the intent of the 4R Act. Such a low rate, below the actual hurdle rate cost of capital, would impede investment and not provide full compensation for the actual current cost of capital as mandated by law.

Recognition that all debt is contractual in nature is included in the analysis undertaken to decide on the asset acquisition. The contractual rates associated with the debt instruments planned during the current period are components of the resulting cost of capital. Assuming that an asset will not be acquired if it cannot reasonably be expected to generate sufficient returns to meet the hurdle rate represented by the current cost of capital, only assets projected to meet or exceed this rate will be acquired. By the very fact that they meet or exceed the current cost of capital, and assuming the projections of their returns are accurate, over their life they will contribute their share of revenue to offset the contractual debt obligations undertaken during the current period when the asset is acquired.

We adopt the current cost of capital for the most recent year that published industry data are available. In this way, the actual current costs of capital are recognized and the per diem rate computation is brought into compliance with the 4R Act.

The next issue raised by certain respondents is whether leases should be included in the debt component of the current cost of capital. Statements submitted by ATSF, 9-Road Group, WP, Allied, and the CNW all called for the inclusion of leases as a debt element in computing the current cost of capital. The 9-Road Group and WP point out that leases should be included as a element of debt because railroads are required to capitalize leases just as with purchases by other debt instruments. CNW indicates that leases are universally considered another form of debt having a low interest rate and resulting in an increase of the debt-to-equity ratio. ATSF, while agreeing that leases should be included in the debt component of cost of capital, argues for an adjustment to the lease's effective interest rate to offset retention of ownership rights by lessors. Such ownership rights include the benefits derived from tax incentives to invest which are passed on to the railroads in the form of lower interest rates than are usually available from equivalent debt instruments.

Railroad car leases fall into two general categories, those in which the leasing company maintains ownership of the car throughout the life of the lease and beyond and those in which the railroad gains ownership of the car over the life of the lease or at its end. The latter, representing the majority of leases and referred to as an equity lease, is interpreted by the Commission as falling into the same category as conditional or deferred payment contracts. According to the Uniform System of Accounts for Railroad Companies, the appropriate amounts must be placed in accounts 764 (Equipment obligations and other debt due within one year), 766 (Equipment obligations), and 546 (Interest on funded debt). These accounts provide the primary sources for data in schedule 218 of the railroad annual report which in turn is the source for the tables contained in "Transport Statistics in the United States," (T.S.) from which the data to calculate the cost of debt component of the Commission's cost of capital proposal is derived. To the extent that these reports are properly completed by the railroads, equity leases are included in the cost of debt. The remaining leases, in which the lease company maintains ownership of the cars and the railroad merely "rents" the car, are assigned to account 536 (Hire of freight cars and highway revenue freight equipment; debt balance). In the case of leases in which railroad does not gain an equity position in the car, fairness requires that the cost of capital previously calculated shall be imputed to these rental cars for the purpose of per diem calculations. If treated in some other manner, marginal, per diem debtor railroads would be prejudiced. A nonequity lease is the preferable and sometimes the only method whereby an unprofitable railroad can acquire additional cars. *Incentive Per Diem Charges—1968,* 349 I.C.C. 303, 325.

The next issue is whether the cost of equity should be tied directly to the cost of debt without any other considerations. The CNW calls for fixing the equity rate in relation to the debt rate so that it be recomputed periodically based on changes in the debt rate. The CNW explains that equity has a higher cost than debt because of the higher risk accepted by equity and the relatively longer life expectancy of equity than debt instruments, but that these higher costs are offset by the effects of tax benefits with a resulting equity rate near to that of debt and varying directly as debt varies.

BN/MOPAC, criticizes CNW's comments and argues that since all firms are competing in the market place for labor, materials, and capital, the returns on equity may be used to indicate the equity portion of the cost of capital. In addition, it says that since the risk borne by equity capital is constantly changing as the capital structure changes, the cost of equity cannot be a fixed percent, but must be recomputed as needed.

ATSF states that the proposed rulemaking recognized the interdependence of debt and equity. ATSF submits that the use of debt for one project directly effects the debt available for other financing, and that debt cannot be issued without an equity base to support it. SP agrees and states that the ability of railroads to continue purchasing cars with 20-percent cash and 80-percent financing depends on the further backing of a lower debt-equity ratio of the overall firm's capital structure.

CRIP supports the approach used in the proposed rulemaking that took the cost of the retained earnings component of the cost of capital as the same as the cost associated with the common stockholders' equity component.

N&W argues that the railroads have far exceeded the safety margin in borrowing with any further increases in debt financing being undesirable. It remarks that the total capital structure of the industry needs to be considered and not just the debt structure related to equipment.

We find that tieing the cost of equity directly to the cost of debt assumes that the net cost of equity changes in direct relation to debt, and that this relationship can be both clearly defined and readily quantified. Although the linking of a fair rate of return to the debt interest rate has been used in past Commission proceedings, in this instance such a procedure is not consistent with current advances in the state of the art in capital costing nor would it remain acceptable in light of the 4R Act's emphasis on capital costs.

Debt and equity are independent of each other in arriving at their respective costs. Debt cost is merely the interest rate paid on the debt contracts. Equity cost is the premium that must be paid to attract investor's funds. The equity cost is normally the dividends that the investor expects and the anticipated increase in market value of his share of stock over time. Realizing that both these measures are difficult to project, the commonly accepted practice is to trend recent activity in these values and project that trend into the near future.

The interdependence of debt and equity comes about by the reaction of lenders to firms with a high debt to equity ratio. Equity investors also remain very sensitive to the debt to equity ratio. The investors' sensitivity is translated into higher equity costs, where lenders may set very strict limitations on acceptable variations in the debt to equity ratios over the life of their debt contracts, as well as reflecting their concern through the effective interest rate associated with their debt contract. Such pressure from both lenders and investors causes a direct linking in amounts of debt and equity issued, and, through market forces, perhaps some indirect linking of the respective component costs of the cost of capital. In a well managed ongoing concern, the cost of equity is determined by the price tag, expressed as a combination of expected dividends and market appreciation of common stock, set on equity funds by the investor. This cost of equity is then included as a component of the cost of capital. The cost of capital is used as a hurdle rate that an investment option must be projected to meet or exceed in its rate of return in order to be undertaken or acquired.

Direct linking of the retained earnings component of cost of capital to the cost of common equity indicates that a firm must consider the costs of financing a project out of internal funds or retained earnings. Since these retained earnings are the same funds from which dividends are paid and are indicators of the financial health of the firm, which impacts on the market appreciation of common stock, they take the same cost as that of new infusions of common equity less any issuing or brokers fees. Beyond the tie of the debt to equity ratio, no connection exists between either retained earnings or common equity costs and debt costs.

We, therefore, conclude that the equity component of the cost of capital should not be directly linked to and permitted to vary with the debt interest rate by any fixed percent. The equity component of the cost of capital is to be computed with full consideration given to interpretations of investors' expectations and resulting prices set for acquiring their funds.

The next area of concern is what length of time is appropriate for trending growth rates to be included in cost of capital computations. ATSF insists that in the informal conference conducted by the staff, the years 1956 to 1973 were used for historic trending of the market value appreciation of common stock for both railroads and the standard with no explanation regarding selection of time period. BN/MOPAC points out that the trendng results are directly related to the length of time chosen for the trending operation. It states that a shorter period than used in the informal conference explanation of procedures would show less growth reflected in railroad operational experience during the late 1960's and early 1970's. The CNW indicates that the staff's selection of a time period for trending was entirely too arbitrary. This sentiment is echoed by CRIP, which criticizes the use of a 20-year period for trending because of the different characteristics exhibited by the railroads 20 years ago. CRIP recommends the use of 10 years as being more representative of growth trends in the industry.

Criticisms of the staff's selection of time periods for trending is unfounded because during the informal conference, the staff prefaced its explanation by stating that numbers were presented for illustrative purposes only and did not represent verified data subjected to detailed analysis.

We recognize that varying the time frame used in trending can have a drastic impact on the results. By the same token, we realize that the time frame must be long enough to smooth cyclical fluctuations, while not extending into time periods in which the railroads would have substantially different characteristics than in the ending period of the anaysis.

The railroads as a mature industry have stabilized their share of the transportation market since the leveling of inroads caused by motor carriage from the 1930's through the 1950's. The actual railroad operations have undergone few major changes in prime characteristics in the past 10 or more years. For this reason, and because a period of 10 years does smooth recent runaway inflation pressures, we conclude that 10 years is an appropriate time frame for trending changes in the real growth of railroads.

There is a dichotomy of opinion between the railroad respondents as to whether the statutory tax rate should be used in lieu of the effective tax rate. The N&W, 9-Road Group, ATSF, BN/MOPAC, SP, and Allied argue for use of the maximum statutory tax rate while CRIP, SOU, SOO and CNW argue for use of the effective tax rate.

The CNW argues that the costs of ownership includes actual taxes paid as a result of any tax benefits or subsidies. These tax benefits are included in the investment analysis of every major corporation. CNW agrees that the congressional intention to not permit regulatory agencies to flow through these tax benefits in rate cases is a legal question. It points out that from an economic standpoint, these are elements that mitigate costs and must be considered to remain consistent with economic principles. SOO agrees by stating that retention of the statutory rate to the exclusion of tax benefits raises rates of return to unconscionable levels, and CRIP says that use of the maximun statutory tax rate gives the per diem rate an inflation that ignores reality.

SOO, recognizing the unique position in tax law held by the investment tax credit, nevertheless argues that the effects of accelerated depreciation should be calculated and used to reduce the maximum statutory tax rate.

BN/MOPAC cited the language published in Senate Report No. 830, 88th Congress, second session, pages 42-43 (1964) as clearly expressing congressional intent that tax incentives such as the investment tax credit not be passed through by regulatory agencies in rate costing procedures.

N&W argues that the purpose of the various tax incentives and benefits is to encourage investment. Were these benefits to be denied owners by using the effective tax rate the intention of encouraging investment would be completely frustrated. This applies equally to all tax incentives and not just to the investment tax credit. The SP criticizes SOU for recognizing this fact for the investment tax credit but failing to apply it equally to the accelerated depreciation provision of the tax law.

CNW counters these arguments by stating that the congressional intent was aimed at not flowing through tax benefits to the general public in rate cases. CNW continues that such a prohibition does not exist in the case of reciprocal intraindustry payments mandated to cover ownership costs. They further state that the congressional prohibition against tax benefit flow through was aimed at encouraging investment by tax payers and not to extract funds from one part of an industry payable to another part of the same industry in a common undertaking and sharing in common costs. Thus, it asserts that the 4R Act in mandating recognition of full costs of ownership requires the flow through of tax benefits in computing per diem rates.

Statutory prohibitions concerning regulatory treatment of tax benefits are designed to maintain incentives for encouraging investment. Given the purposes of encouraging investment in section 212, the prohibition against flowing through these incentives appears at first blush to remain valid when the rate is to be applied to intermediate intraindustry users through per diem payments. However, the actual costs are represented not by the statutory maximum tax rate but by the effective tax rate and are so considered in investment analyses. Under a theory of sharing ownership costs, it would not be appropriate and would impose an undue burden on net debtor railroads to employ the statutory rate. Since the primary source of cash flow resulting from car investment is revenue derived from transporting freight, we believe the prescribed regulatory treatment is intended for application to ultimate consumers. We conclude that for per diem rates the computation of the equity component of the cost of capital is properly based on the effective tax rate for corporations whose data are used for computation of the current cost of equity. We note that full consideration of this issue is being undertaken in Ex Parte No. 338. Accordingly, our conclusions herein are subject to modification on the basis of findings in that proceeding.

The next issue to be discussed is whether the market appreciation rate should be converted to a pretax level. ATSF's statement indicated that cost of capital is normally after-tax oriented, but the proposed rulemaking correctly converted to a pretax basis.

Statements submitted by SSI, the 9-Road Group, WP, SP, and BN/MOPAC all call for the adjustment of common stock appreciation rate to a pretax level. The major argument is that common stock appreciation is based on the retained earnings available to support the price appreciation. They continue by citing that these retained earnings are subject to income taxes, consequently, the market appreciation rate should be converted to a pre-income tax level to give proper recognition to this fact.

CRIP indicates that the proposed rulemaking's methodology correctly computes the rail common and preferred dividend yield rates as after-tax levels, then incorrectly converts these yields to a pretax level.

Statements by the 9-Road Group, WP and the SP argue that the proposed rulemaking failed to adjust the cost of common and preferred stock for income taxes.

The common stock appreciation rate is a function of the investor's recognition of the real growth of the firm and inflation. The investor is not concerned only with the growth of retained earnings, for that accounting amount can be affected by reducing expenses during the accounting period. An example of this action in the railroad industry is the blatant deferring of road and equipment maintenance by some roads thereby maintaining a seemingly sound financial picture from an accounting standpoint.

In part, common stock appreciation results from the investor's recognition of numerous signals that reflect changes in the long-term growth and financial viability of the organization. Investors holding or desiring to hold securities in mature industries must be concerned with long-term growth and financially responsible operations because mature industries carrying on normal operations, characteristically do not return rapid growth or market appreciation of common stock over the short run period. On the contrary, a mature industry generally mirrors the movement of the overall stock market, but at a different level. This differential represents the market's cognizance of the particular risks related to that industry compared to the general risk level of the overall market.

The rate of market appreciation is not solely or directly dependent on the retained earnings of the firm. With the market appreciation rate, in part, reflecting the investor's estimation of the actual financial health and growth of the industry, there is no need to adjust such a growth calculation of the tax rate paid on net income from which retained earnings are derived. The growth of a firm with net income before taxes above the level at which the maximum statutory tax rate is applied will be the same as its growth rate after taxes. The absolute amount of after-tax dollars would be substantially reduced, but the growth rate would remain effectively at the same level. By way of example, a firm earning $100 net income after taxes in the first period, and $120 in the second period experiences a 20-percent growth in pretax net income. If that same firm, for sake of simplicity, is subject to a tax rate of 50 percent, that firm's after-tax income in the first period becomes $50 and $60 in the second period resulting in the same 20-percent growth rate. With the investor's evaluation of growth centering on the rate of change, the investor's determination would remain the same whether conducting the evaluation before or after taxes.

We, therefore, reject the proposal to adjust the growth element represented by the market appreciation rate for common stock by the tax rate to a pretax level, and conclude that the market appreciation rate without concern for taxes is the appropriate growth element for inclusion in the cost of capital calculation.

Also in issue is what method should be used in the computation of a growth rate in finding the equity component of the cost of capital. CRIP points out the proposed rulemaking used the current dividend yield and the expected share price growth, one of the several accepted methods. The deflated share prices are used to predict future share price to extrapolate growth. CRIP goes on to show that to correctly calculate the growth in share price, one should use the formula:

$$\text{Cost of Common Equity} = \frac{\text{Current Dividend Yield} + \text{Growth in Share Price}}{1 - \text{Current Dividend Yield}}$$

ATSF's statement indicated that the proposed rulemaking's use of stock price as a measure of growth was wrong because stock price is assumed to be an indicator of investors' expectations of the present value of the stream of future earnings or dividends per share. ATSF continues by arguing that net earnings per share is the preferred indicator of actual growth of the firm over time.

ATSF, in criticizing the proposed rulemakings average growth calculation, argues for adoption of a logarithmic trend line with slope coefficient acting as the growth indicator or, at least, the use of a compounded average growth rate between the first and last years.

We recognize that in some commonly accepted DCF formulas for cost of equity the growth component added to earnings or dividend yield can take the form of the growth rate of dividends or earnings. This is not inconsistent with using a market appreciation rate for the price of common stock. As ATSF states, the stock price reflects the expected stream of future dividends or earnings. In effect, the market appreciation rate (computed over a 10-year time span) substitutes the price as of a point in time for a stream of dividends or earnings from that time forward. Consequently, to say investors' expected return depends on current yields and future growth rate of dividends, is essentially equivalent to saying it depends on current yield and stock price appreciation. A distinction can, however, be drawn in that historical dividend growth rates reflect actual, realized financial results of the firm's operations while market appreciation rates reflect investor expectations of the future of different points in time in the past.

Logarithmic trending and utilization of the resulting slope coefficient appears to overburden an interim procedure. By the same token, the average growth calculation of the proposed rulemaking lacks adequate sophistication. Although producing very similar results for a growth factor as the average growth calculation, the average compounded growth calculation has the merits of ready calculation by anyone understanding the compounding interest process and the necessary sophistication to provide greater accuracy.

We, therefore, conclude that the market appreciation of common stock shall indicate growth of the industry as perceived by investors and that this growth will be computed by finding average compounded growth of the linearally trended changes in value between the beginning and ending periods used in the calculation.

Another issue raised by respondents concerns whether the market price appreciation of common stock used in the growth calculation should be deflated to real dollar growth. N&W, BN/MOPAC, and CNW, in addition to statements by SSI, the 9-Road Group and WP argue against deflating the market value appreciation of common stock to real dollars. Their argument rests on the idea that investors invest in and receive their return in current dollars, therefore, market price of stock should not be converted to constant dollars.

This is a sound argument. Holding the return on equity in per diem rates down to reflect a real growth rate excluding inflation, may result in a shift of investment funds to other uses in the economy where opportunities exist for keeping up with inflation. Equity capital funds, just as labor or material, are subject to price inflation. And just as per diem will be adjusted to the extent practicable to reflect current price and wage levels, cost of equity must also be incorporated at a level that reflects current inflationary conditions. For this reason we conclude that the inflation component should not be eliminated from the calculation of growth rate.

Respondents also question whether industry growth should be compared to some outside standard. ATSF's statement indicated that utilization of a standard is acceptable if it is applied to dividend yields as well as the market price appreciation of common stock. It continues by showing that common equity should either be computed exclusively on railroad data or exclusively on composite industry data. ATSF also states that the major difference between the methodology submitted in Ex Parte No. 271 and the Ex Parte No. 334 proposed rulemaking is the use of a standard. The methodology submitted in Ex Parte No. 271 recommends using profitable railroads as a standard because they are industry specific. The proposed rulemaking calls for using an industrial composite as a standard.

The SP recommends using only profitable roads for computing cost of equity based on the market appreciation formula. It goes on to say that the same group of carriers should be used for both the market appreciation and dividend yield components of cost of equity. At the same time, CRIP argues that a cost of capital cannot be computed for railroads by using data from unrelated industries. It argues that railroads' growth should be used exclusively, whether it results in a positive or negative value.

The 9-Road Group and WP point out that for a company with declining or no earnings, its stock price is not based on past earnings, but on liquidation value and other considerations. For this reason, the computation of a cost of equity should be made only on the most profitable roads. They continue by addiing that price appreciation should not be computed to be added to the dividend yield of another group of railroads, but that both factors should be computed for the same group of roads, which are the most profitable.

BN/MOPAC, in discussing the proposed rulemaking's use of a standard, said that an evaluation must be made between investment grade railroads and some reference group. It supports this by saying that one must look at the entire economy that is competing in the money market instead of just railroads in order to find a railroad cost of equity.

As stated in the proposed rulemaking, the source of statistics for both the common stock appreciation and the dividend yield rate is the same table in "Moody's Transportation Manual." To the extent that this source records values for the same carriers within the table, the same group of carriers are used in computing the common stock appreciation and dividend yield rates.

Computation of an equity cost to the firm based on investors' expectations is expressed in the dividend yield rate and the market appreciation of common stock. The dividend yield rate computation is straightforward. Normally, investors recognize this rate and accept it by virtue of their investment. By the same token, the investors' expectations of potential growth or continued stability of the firm or its risk characteristics are reflected in the market value appreciation trend. In an industry where investment by stockholders is growing, regardless of whether the firm is mature and stable or still growing, the existing dividend yield rate and the market value appreciation rate would reflect a bona fide cost of common equity funds to the firm.

In the case of a firm, or industry, suffering from a decline in stockholders' investment, the dividend yield rate and the market value appreciation rate no longer equates to the firms cost of common equity. Reliance on dividend yield and market appreciation to compute a cost of capital for firms in this situation would, at best, perpetuate the existing trend of decline in investment by potential stock purchasers. If investors are not investing in a firm, then that firm is not generating a satisfactory return to the investor, expressed in terms of market value appreciation and dividends, that is commensurate with the investor's perception of the related risks of the firm compared to other alternative investments competing for funds in the money market.

The stated intention of section 212 of the 4R Act, to stimulate investment by railroads in freight cars, carries an implication that the railroads, as an industry, must be made more attractive to outside investors. If this enhancement of the railroad industry is not taken into consideration in this proceeding; equity capital will not be attracted to the industry in sufficient quantities to support the investment in equipment postulated as the purpose of section 212 of the 4R Act.

If aggregate industry data are used to compute cost of equity, the result is based by the poor financial results of some roads not attracting or retaining capital funds. Such a result would defeat the foregoing purpose of attracting or retaining equity capital. Consequently, the cost of equity for per diem purposes should be derived based on data for selected, profitable roads only. Furthermore, the select group should account for a predominant share of the ownership of freight cars, since it is the cost of capital for the primary purchasers of freight cars that is most relevant for per diem purposes. To implement this approach, a group of 10 railroads (excluding unprofitable roads) owning a predominant share of the freight car fleet should be used to compute the DCF cost of equity measure, consisting of the current dividend yield plus a 10-year market appreciation rate for common stock prices.

Statements submitted by the 9-Road Group and WP indicate that book value should be the basis of calculating the preferred dividend rate which is then adjusted to a pretax level to arrive at the cost of the preferred equity component of cost of capital.

CNW argues that book value substantially understates the ratio of debt to equity because the industry overall cost of capital requires use of the market values of the debt and equity securities involved. This view is refinforced by the statement submitted by ATSF. ATSF says that ideally the cost of preferred stock would be calculated by dividing dividends by market price, but market price is not generally available so the proposed rulemaking uses book value.

The book value is the accounting value at which the preferred stock is carried. It also represents the amount of funds received by the firm when the stock was issued. Since there is little or no market for exchanging railroad preferred stock instruments, this book value becomes in effect a market value. For this reason, book value represents the value attached to incremental additions to the capital pool of funds of the industry. We, therefore, conclude that book value is the approriate value by which to determine a cost of preferred equity.

Respondents question whether book value or market value should be used in computing a dividend yield for preferred stock. ATSF stated that ideally the cost of preferred stock would be calculated by dividing dividneds by market price, but market price is not available, so the proposed rulemaking methodology incorporated use of the readily available book value. The CNW presents the view that use of book values substantially understates the ratio of debt to equity because the industry overall cost of capital requires the use of market values of the debt and equity securities involved. Taking the opposite view, the statements by the 9-Road Group and WP argue that the preferred component of cost of capital should be based on book value and adjusted to a before-tax level.

Preferred stock is generally bought for its investment value with regard to dividends, therefore, in applying a cost to preferred stock for future investment decisions or to calculate per diem charges, we must look at dividend yields calculated on an assets value which reflects the costs which would be encountered in incremental additions to the existing structure of stock. Therefore, we conclude that book value should be used for calculating preferred stock dividend yields.

As to the issue of the proper debt to equity ratio to apply in developing a cost of capital, CRIP indicates that the NPRO correctly applied the weighting procedures when using the debt-equity ratio associated with new infusions of capital occurring during the current period. BN/MOPAC argues that the weightings of the respective component cost of capital should be those based on the imbedded capital structure. It states that weighting based solely on incremental capital issues bear no relationship to costs incurred and cannot be supported on an economic basis. CNW postulates that the debt-to-equity ratio must be evaluated on an after-tax basis to properly account for tax benefits of ownership, and would bring the debt to equity ratio to 85-percent debt to 15-percent equity on average annual balances of unrecovered investment in cars. CNW reinforces this concept by assuming that cars have lower risk than overall railroad property, therefore there is logical reason for applying the industry average debt ratio.

The use of an imbedded debt-to-equity ratio would disregard the application of a cost of capital based on current acquisition of funds for the period in which the specific asset acquisition decision was made and executed. The imbedded debt-to-equity ratio is a key indicator of the financial health of a firm and is frequently used by lenders in setting restrictions on the firm in order to protect the lenders debt contracts with the firm. These activities bear little relation to the computation of how much it will cost to gather funds during the current period to finance investments in assets projected during the same time frame.

The argument to evaluate the debt-to-equity ratio on an after-tax basis, in order to account for the effects of tax benefits of ownership, fails to recognize that investment oriented tax benefits depend on acquiring the asset, not on increasing the capital pool of funds. Because the tax benefits are asset related, instead of funds related, they are used in computing the asset's projected rate of return which is to be compared with current cost of capital hurdle rate in making the investment decisions.

The argument that cars have lower risk characteristics than railroad operating property and therefore, an industry average cost of capital is inappropriate, assumes that a car in normal operations can generate revenue without the concomitant trappings of an operating railroad. We recognize that the unique situations of some small railroads coupled to tax advantages and exclusive reliance on incentive per diem cars gives the illusion that cars can generate revenue without a railroad, but these roads are not typical of the railroad industry's operations. A car on an operating railroad takes on the same risk characteristics as the overall railroad. The same relationship can be inferred to the industry, therefore, for economic regulatory purposes, the average debt rate for current infusions of capital, relative to the equity rate applied to the equity component provides the appropriate weighting relationship.

We, therefore, conclude that for per diem rate computation the average industry debt-equity ratio is the appropriate debt-to-equity factor to be used for weighting the relative costs of the debt and equity components used in arriving at the cost of capital.

SUMMARY OF CONCLUSIONS—COST OF CAPITAL

The 4R Act mandates a methodology of computing per diem rates that gives full recognition of the true economic costs of acquiring capital funds for railroad investment. The mandate does not require an absolute increasing of the per diem rates, but does require development of a methodology of arriving at the per diem rate that will give full cognizance to the current cost of capital as a component of actual ownership costs. Establishment of such a methodology eliminates the possibility of accepting an unfounded arbitrary rate as an appropriate current cost of capital.

Cost of capital is associated with the cost of acquiring additional increments of funds for the overall capital pool, therefore, the current cost of capital is not computed based on the financing vehicle chosen in conjunction with a particular asset.

The general method of determining the cost of capital for this proceeding is to apply a discounted cash flow approach. This method considers the economic costs to the firm as the return required to provide the debt investor his interest, and, the equity investors their earnings. In addition, the firm must maintain a healthy operating and financial condition that will promote a market appreciation rate of common stock adequate to maintain the same level or encourage additional common stock investment.

Inasmuch as per diem proceedings are subject to reopening by the parties as rate readjustments are required, there is no need to tie the cost of capital rate to an index that would automatically trigger a change in the cost of capital based on changes in arbitrary economic indicators.

The current cost of capital concept develops a hurdle rate against which the rate of return of an asset is compared in arriving at an acquisition decision. If the operating asset is not projected to generate at least a rate of return as high as the cost of capital, then if all other factors are the same, the asset will not be acquired. The current cost of capital is that cost of acquiring the projected funds during the same period in which the asset is to be acquired. As such, the current cost of capital is only concerned with incremental additions to the capital pool and imbedded debt and equity costs are disregarded. Inclusion of the current cost of capital in the per diem rate computation insures that while cars are in per diem use, they generate a rate of return at least equal to the average industry current costs of capital. The current cost of capital factor to be included in the per diem rate will not consider imbedded debt or equity.

Because of the time lag related to the publishing of "Transport Statistics in the United States," which is a primary source document for the current cost of capital calculation, the calculations based on the most recent issue of "Transport Statistics in the United States" will be imputed to all later years. After the release of each issue of "Transport Statistics in the United States," a new computation will be made giving the latest current cost of capital.

Inasmuch as equity leases are included in accounts generating the tables listed in the proposed rulemaking as sources of data for the cost of capital calculation, these equity leases are included in the cost of debt. Other leases in which the lease company maintains permanent exclusive ownership rights and the railroad merely rents the equipment are not included in the computation of the per diem formula. However, the current cost of capital to which equity leases are a component is imputed to these rented cars through application of per diem rates to all cars subject to the per diem rules.

The debt component of the current cost of capital becomes that weighted average interest rate caused by new infusions of all debt during the current period to which the calculation is being applied. Equity leases are included in the debt rate. Normally, the debt component of a cost of capital is converted to an effective after income tax rate, but because the cost elements of the per diem formula develop a rate that generates a revenue payment before taxes, the correct procedure is to adjust the entire cost of capital to a pretax level. The debt rate is initially computed at a pretax level so there is no need to adjust the debt component of current cost of capital to a pretax level.

Given the unique cost and risk characteristics of equity, it would be erroneous and illogical to tie equity costs to debt interest rates with some fixed percentage relationship. Rather, debt and equity cost components must be calculated separately then brought together in a weighted average. This weighting is accomplished through the use of the overall debt-to-equity ratio.

The equity component of current cost of capital is represented as the minimum return the firm must generate to entice common equity investment. The common stockholder expects his dividends plus an increase in the value of his stock. With imperfect prescient knowledge of market value appreciation rates, the firm is left with trending past performance to predict an acceptable market value appreciation rate. The cost of retained earnings is the same cost as that attributed to common equity because retained earnings remains a prime asset of equity.

The dividend component of common equity must be adjusted by the effective tax rate to arrive at a pretax level. The adjustments to a pretax level is necessary because the per diem rate generates a revenue to the owning railroad that reflects costs and income before taxes. Since per diem rates are intended to share actual ownership costs, use of the statutory maximum tax rate would artificially transfer funds from net debtors to net creditors in excess of the actual current costs of equity. Tax benefits such as the investment tax credit or the accelerated depreciation provisions of the tax law will still be derived from freight revenues which are the principal cash flows to be obtained from the investment in cars.

The market appreciation component of the cost of capital presents a more complicated picture. In order to get an accurate picture of the average yearly growth of the market value of common stock, the market value is trended over some acceptable period to determine the average yearly growth. For purposes of trending, 10 years is accepted as a reasonable maximum length of time that reflects a coherent period of railroad operations.

Inflated dollar growth is used because holding the equity return down to reflect only a real growth rate would fail to recognize investors' opportunities to obtain a return elsewhere that does reflect current inflationary conditions and expectations. This would create disincentives to freight car investment.

Adding the dividend yield and the market appreciation rate for a group of 10 profitable roads accounting for the highest portion of car ownership appears to be a sound means of obtaining the cost of equity most relevant for basic per diem rates responsive to the objectives stated in the 4R Act.

The final element of the cost of capital is the preferred equity component. This component amounts to the dividend yield rate adjusted to a pre-income tax level based on a statutory maximum tax rate of 48 percent. The preferred dividend rate is found by applying the book value of par and nonpar preferred to the dividends.

An overall average equity component is then found by weighting the relative proportions of common retained earnings with the preferred equity.

The final step in computing the current cost of capital is to weight the cost of debt with the cost of equity by the debt to equity ratio.

We therefore, conclude that the appropriate method of computing the current cost of capital for per diem proceedings involves the application of the modified discounted cash flow method and resulting development of a current cost of capital.

Finally, while this method of determining cost of capital is being adopted for present purposes, it remains subject to such modification as may be appropriate upon the conclusion of Ex Parte No. 338.

TRANSPORTATION USE

Section 1(14)(a) as amended requires this Commission to give consideration to the transportation use, among other factors, of each type of freight car. The reason for focusing upon transportation use is to compensate the car owner for providing cars for transportation-related purposes, but to avoid compensating the owner for providing the car for nontransportation related purposes. Otherwise, the result is a profit to the owner, rather than compensation alone.

Realistically, more cars are actually provided for transportation than are actually used for that purpose, because once provided, some of the cars will be out of service for repair and some will be surplus cars utilized only for high demand fluctuations. Although not always actually used as such in transportation, all of these cars are provided for transportation use, and the owners are to be proportionately compensated therefor.

However, cars are also provided for nontransportation related purposes. For several examples, an individual railroad might experiment with new construction material and techniques in preparation for purchase of a large order of cars. Its pilot test cars might well cost more per car to build, but would serve the same purpose as, the final product purchased in high volume; the excess construction costs are not to be recovered from the users of the handmade pilot cars. As further example, for transportation of certain shipments which require a specific time, a shipper-owner might elect to purchase enough cars to allow some cars to be used for its warehouse storage while others are in transportation; other users of the car are not to compensate the owner for storage-related costs, but only for transportation-related cost of providing the cars.

As we explained in our notice of proposed rulemaking, transportation use reflects both time and distance of freight cars in movement.

Time is to be measured in terms of active car-days; distance, in terms of car-miles per year. Extraneous factors such as revenue generated per car, which either cannot be verified or are not material to transportation use can thereby be disregarded; a shipper is entitled to have low rated as well as high rated commodities transported without discrimination. A car-day divisor and a car-mile divisor together are to reflect transportation use; change in either time or mileage measurement accordingly effects a corresponding change in the compensation needed and determined by application of the basic per diem formula.

In their initial statements, 10 railroad respondents comment on the subject of the car-day divisor, and four comment on the car-mile divisor. Four of the railroads accept car-days as being a reasonable measurement of transportation use.

The four respondents that comment on the car-mile divisor are in agreement that this measurement presents no problem and is an acceptable indication of transportation use. There were no replies regarding the car-mile divisor. The respondents state that although mileage by individual car type is not presently available, the railroads can develop car-miles by individual car type with a minimum of effort. The mileage statistics will be reported on form OS-A which will replace old schedule 531 of the annual report.

One respondent, the 19-Road Group, suggests using a car-mile divisor of 17,468 miles as a constant divisor for a period of 4 years, 1978 to 1981 until such time industry studies can be completed. These miles were used in the latest per diem rate increase allowed in docket No. 33145. We conclude, however, that this proposal is not acceptable, because it would delay, for 4 years beyond the deadline set by Congress, the development of a car-hire formula to determine time and mileage charges by car type. Moreover, we find that the proposed mileage figure cannot be made applicable to each type of car, because it is based on all per diem cars as a whole and would not be representative of individual car types.

The initial statements are more controversial regarding the car-day divisor. The 19-Road Group submits a proposal to use the car-day divisor that was developed in the latest per diem rate increase allowed in docket No. 33145 for a 4-year period, 1978-81, until such time industry studies can be completed. Southern agrees with the group.

The CNW states that in its view, Congress determined that surplus car-days should be eliminated from the divisor by the requirement that only transportation use, and not all uses of a car, is to be considered in the formula. CNW proposes the following formula:

> 365 times (100% - x) times the ratio of foreign per diem days to foreign serviceable days in which x equals the percentage of bad order cars up to a maximum of 6 percent.

Bad order cars are those which are not able to be put into service due to defects, and are not written out of ownership.

The SOO does not propose a formula, as such, to develop a car-day divisor. It states that the formula for calculating ownership expense should not reflect a car-day divisor reduced by surplus days. Car surplus days are days empty cars are able to be put into service and are on hand at stations but are in excess of the number of cars ordered for loading and are not awaiting movement or transit. SOO contends that these surplus days are properly chargeable exclusively to the owner, not the user, and that to pass any part of that cost on to the user would be grossly unfair to the user and would result in an unwarranted windfall to the owner. SOO states that by eliminating idle car-days from the divisor, a per diem premium is placed on cars in surplus supply as compared to cars in tight supply. This encourages use of cars already in tight supply and discourages the use of surplus cars, thereby creating a counterproductive incentive on maximum utilization of surplus cars. SOO agrees that it is proper, as a general rule, to reflect bad order days in the construction of a car-day divisor, but under some circumstances that may not be the case. It points out that frequently, for some business reason, a carrier will carry a car in bad order condition rather than repair it when cars of its type are not in demand. When there is an upturn of business and an increase in demand for these cars, they will be repaired.

Six respondents, N&W, ATSF, WP, BN/MOPAC, SP and the 9-Road Group, introduce a different concept to use in the development of a car-day divisor, the standard utilization ratio method (SUR). The main difference between the SUR and the present method, or other methods utilizing surplus and bad order days, is that the SUR depends on measuring the divisor in terms of cars loaded, with an adjustment for bad order cars. These respondents state that whenever a sharp reduction in demand occurs or freight car owners either place unneeded equipment in service or purchase unneeded equipment, per diem rates, calculated under the docket No. 33145 or that here proposed, will increase because the car-day divisor decreases. If rates are calculated using the standard utilization ratio method, the car-day divisor does not change and per diem rates do not change as a result of this factor. They also state that if the demand for cars soars, under the present method of calculating per diem, the car-day divisor increases and per diem rates decrease. In contrast, under the SUR method, the car-day divisor does not change and per deim rates do not change. Thus, they contend that the SUR method of calculating the car-day divisor tends to eliminate the distortion caused by severe fluctuations in car demand.

There are numerous replies regarding the car-day divisor and the proposed standard utilization ratio, although there are no replies regarding the car-mile divisor.

Regarding the car-day divisor the 19-Road Group in its reply favors using the car-day divisor developed in the formula prescribed in docket No: 33145 used to calculate time and mileage rates which went into effect April 1, 1977.

WP replies that whereas the 19-Road Group urges the Commission to adopt the 336 car-day divisor on an interim basis until studies can be completed to determine what portion of surplus and bad order car-days should be assigned to the car-day divisor, the request for more studies is an attempt to oppose the congressional mandate to adopt a realistic car-hire formula now. It states that the railroads have already expended time and effort to resolve the question of what to do with surplus and bad order car-days and that the resolution should be the standard utilization ratio.

WP also refutes the contentions of CNW and SOO. It states that, to the extent car supply sometimes exceeds car demand, any increased cost of ownership should be borne by all users who benefit from the car, rather than by only the owners. WP refutes the presumption that surplus cars arise because owners acquire cars to protect the loadings of their shippers which move over user roads.

BN/MOPAC also replies in opposition to the formula proposed by CNW. It contends that the formula places all car costs associated with surplus car-days squarely on the owner. It refutes CNW's rationale for the formula that the owner should be liable for all surplus car-days because the owner acquires cars through purchase or lease to protect and secure traffic movements and related revenues. While it acknowledges that a carrier pruchases cars to protect traffic loading requirements, BN/MOPAC states that CNW's formula leaves the carrier responsible only for unproductive car capacity related to a controlled maximum down time for car repairs, but not for the unproductive car capacity related to surplus cars. It concludes that, if a car is used by more than one party, each user should be responsible for its fair share of surplus capacity.

ATSF replies, similarly, that the construction of the 4R Act employed by CNW to exclude car users from bearing the obligation to share in compensation for surplus days is inconsistent with the express intent of Congress to encourage acquisition and efficient utilization of freight cars. ATSF further argues that the relationship between a railroad car owner and a car user must be regarded either as that of a joint venture providing a service or that of lessor and lessee in which the car owner does not participate in the movement. When it is a joint venture the user should share in the joint risk that the valuable asset employed in the venture will not be utilized 100 percent of the time. When the owner does not participate, the owner should be entitled to a rate of compensation which takes into account idle time.

SP replies to the surplus car issue that there must normally be some idle days in the equipment fleet, due to normal fluctuation in shipper demand, and that surplus car-days create an industry problem, not just an owner problem. SP argues that the originating carrier is only one of several joint participants, and that all participants should share equitably in the idle days generated as a byproduct of the participation. SP further argues that there should be a distinction between normal idle days and surplus days resulting from the unwise purchase of cars, and that under the proposed SUR method of determining car activity a distinction can be made between the two.

Regarding the SUR, WP replies that car users benefit from the revenue produced by interline movements when the car owners acquire enough cars to protect the loadings of their shippers. In support of SUR, WP further replies that the SUR would treat as surplus those cars not utilized during the peak loading period, and those cars would not be used in development of the car-day divisor.

BN/MOPAC replies that, generally, the history of the rail industry indicates that there is usually a deficiency in the national car fleet, rather than purchases of excess equipment, in contradiction to the CNW's claim. BN/MOPAC contends further that the SUR method is a practical and accurate method of determining the car-day divisor. This ratio indicates surplus car-days as a function of demand measured by carloadings, rather than of supply measured by car ownership. It measures the surplus car-days existing between yearly average carloadings and the peak loading period of the year. The level of car ownership thus does not enter into the calculation. BN/MOPAC argues that this method has been known to the industry for a number of years, and that it should be implemented because those carriers which share in the use of the car asset should equally share the cost of unproductive time (surplus car-days).

The CRIP replies in opposition to the SUR method. It contends that the standard utilization ratio, a ratio of average to peak loading by car type, would mitigate any effect that per diem might have upon the size of the car fleet because it is determined independently of the number of cars in the fleet.

CNW replies also in opposition to the SUR method. It argues that the method, by developing an overall surplus percentage, would result in an excessive number of surplus days getting into the car-day divisor calculation, despite the proponents' contentions that excessive fleet acquisitions could not get into the formula. CNW contends that the anomaly would arise when the excess which is intended to be automatically adjusted for is utilized for only four peak loading weeks per year rather than for a demand characterized by more normal carrier obligation.

SOO replies that the SUR method is generally advocated by creditor lines, but that the method is conceptually unsound and unfair in its impact upon the debtor lines. SOO contends that it is more unfair than the Commission's proposed formula, and that the fatal defect in both formulas is that they rely upon industry average surplus days as a basis for increasing per diem rates. SOO states that they ignore the fact that a disproportionate allocation of those surplus days is accumulated by railroads whose traffic is preponderantly overhead or terminating, rather than originating. SOO refers to the contention in its initial statement that in 1976 the SOO originated less than 40 percent of total carloads handled.

The 19-Road Group replies that it would defer to the car-day divisor presently utilized by this Commission rather than institute the SUR method of calculation. It states that the SUR is highly disputed among the railroad industry and advocates an interim approach pending an analysis of alternative methods, because no one method should be adopted on a permanent basis in light of the dispute.

Our conclusion regarding the car-day divisor, and the standard utilization ratio, is as follows. The 19-Road Group proposes to use the car-day divisor developed in the latest per diem increase allowed in docket No. 33145, which was made effective April 1,

1977. This factor was developed from data related to all railroad owned cars. We find this proposal unsatisfactory, because, first, data, on all cars combined will probably not be representative of individual car type activity, and this consideration is of such importance that we cannot use an arbitrary factor, and, second, the use of this factor for an interim period of 4 years, 1978-81, would only prolong the implementation of reasonable rules, regulations and practices with respect to car service, including the compensation to be paid for the use of each type of freight car.

The CNW proposes a formula that reduces the number of potential car-days in a year by a bad order ratio (with a 6-percent limitation) and then adjusts this number by a ratio of foreign per diem days to foreign serviceable days (days which are or should be paid for), to arrive at a number of per diem days payable for use in calculating basic time charges. An analysis of this method indicates it to be faulty and unacceptable. As the bad order ratio decreases, the number of so-called active days increases. When this statistic is then adjusted to account for foreign bad order and surplus days, the number of car-days payable increases and in some cases could produce payable days in excess of the number of days in a year. We, therefore, find this proposal unsatisfactory, at least until further experience is gained and it can be proven that it is a workable method.

Several respondents propose the use of a car-day divisor which is based on the SUR ratio of average yearly loading to the average 4-week peak loadings increased to consider bad order time, which is then applied to the number of days in a year. The result represents the car-day divisor for use in determining the daily time charge. This method fails to give consideration to days which are or should be paid for and only gives consideration to loaded days. It would produce a car-day divisor which is less than that produced by use of the present method or the method proposed by the Commission, and it would thereby produce higher daily rates. However, these rates would apply to all cars whether under load or not. The end result would be that the user would pay more for the use of freight cars than it would cost the owner. We feel that the concept of the SUR is well founded in principle but requires further refinement. Therefore, we find that the SUR method is unsatisfactory.

We will adhere to the present method of developing a car-day divisor, with two minor modifications of the methods shown in the proposed rulemaking to better adjust the car-day divisor for bad order days and for surplus days.

Bad order car-days are to be calculated by averaging the number of bad order cars at the beginning of each of the 12 months of the study year, instead of merely the number of bad order cars at the beginning and end of the study year, and multiplying this average by the number of days in a year. The source of this information is the AAR Publication CS-60A. This modification will smooth out any drastic fluctuations occuring from the beginning of 1 year to the beginning of the next year.

Surplus car-days are to be calculated by averaging the number of surplus cars counted for each week of the 52 weeks of a year, instead of merely for the week ended nearest to the first of a year and the week ended nearest to the last of a year, and multiplying this average by the number of days in a year. The source of this data is the AAR Publication CS-44. This modification will smooth out any drastic fluctuations experienced throughout the year.

The Commission has recognized that the AAR reports of surplus and car shortage are suspect. See *Incentive Per Diem Charges—Gondolas,* 353 I.C.C. 612, 618 (footnote 8). Reports of bad order car-days are also suspect. While such reports can be used as an aid in determining general car distribution, they may not be reliable enough as an input to the per diem compensation formula. Accordingly, the Commission will review the data collection procedures of these reports in order to improve the reliability of the reported data.

With these modifications the present method of calculating the car-day divisor is intended to promote the philosophy which we expressed in *Chicago B. & Q. R. Co.* v. *New York, S. & W. R. Co.* 332 I.C.C. 176, 226-228 (1968). Pursuant to our discussion in that decision, it is first necessary to ascertain from data accumulated in the study year the car-day divisor to be used in order to reduce the total annual cost of car ownership to an amount per car per day. It has been customary to exclude from the total possible car-days the car-days of cars on owners' lines which are unserviceable and those which, for lack of employment, are considered surplus. In this fashion, the cost of per diem fleet is intended to be spread over and borne by the cars held by users or being used by owners.

However, as further discussed in that decision, this determination, alone, is not a satisfactory measurement of the days over which ownership costs should be spread. Per diem payments by users of foreign cars are made, with unimportant exceptions, for each day a foreign car is on line, whether or not in a surplus or bad order category, and thus are made for days excluded in the calculation of the total active car-days. Therefore, the car-day divisor must be adjusted by the ratio of the number of active days that per diem cars are on foreign lines to the number of days for which per diem is paid for such cars. As we stated in our decision:

> Since car owners are users of their own cars and, when in such capacity, should bear the user's share of ownership cost, fairness to all users requires that total ownership costs be spread over the total days for which payments are or should be made.*** Development of the car-day divisor in this manner credits all users, including owners when using their own cars, with the same relative proportions of surplus and bad order car-days, while excluding the great majority of surplus and bad order car-days of cars on home lines. Costs of the home bad order and surplus cars are thus spread over the payments made for the cars in use.

Reevaluation of the car-day divisor in light of transportation use as prescribed by the 4R Act has not diminished the importance of these considerations. In order to properly give consideration to the transportation use of each type of freight car, we will continue to adhere to use of the car-day divisor, as modified above, in conjunction with the car-mile divisor.

Transportation use is thus described and measured, and so defined, as a function of time and distance variables, as discussed above.

Finally, while adhering basically to the present method of developing the car-day divisor, we will continue to observe the results of its application by type of car. Experience will indicate whether variations among car types in surplus and unservicable car-days and the ratio of active days on foreign lines to per diem paid days induces any unfair or too highly fluctuating time charges. We also encourage the industry to experiment and further develop the SUR or other methods and formulas.

SHIPPER AND PRIVATE CAR COMPANY CARS

Section 212 of the 4R Act amends section 1(14)(a) of the Interstate Commerce Act governing the Commission's authority respecting compensation to be paid for the use of the shipper or third party owned freight cars. Such cars are generally owned or leased by shippers and private car companies. The notice of proposed rulemaking states that:

> The cost of ownership incurred by shippers and private owners is not available to the Commission. Suggestions from concerned persons as to how this information might be obtained are solicited. In view of the unavailability of such data, it is

proposed that rates of compensation for railroad-owned cars be applied to all cars except tank cars. As the ownership of tank cars by railroads is minimal, it appears inappropriate to impute railroad cost of ownership of this type of car to shipper and car company owners. Tank car compensation will be implemented in a separate rulemaking proceeding, Ex Parte No. 328, ***Investigation of Tank Car Allowance System***.

Shipper and private car company respondents.—Numerous statements were filed by shippers, private car companies and their associations in response to the notice of proposed rulemaking. Generally, these parties agree with the Commission's interpretation that the 4R Act requires it to consider compensation to be paid for the use of privately owned cars. A majority of these respondents favor a time/mileage system of compensation for private cars. Several of the shippers complained that the present mileage allowances are inadequate. They believe that there must be developed a better mechanism for determing private-car compensation rather than the litigation procedure that has been used in the past.

The LO Shippers Action Committee (LOSAC) and the Shippers Equitable Compensation Action Committee (SECAC) described their repsective past and pending negotiations with the railroads. LOSAC, after filing a complaint with the Commission in docket No. 35617, has negotiated with the AAR throughout the 4-year period, 1973-76. During this period the railroads and LOSAC conducted an utilization study to determine the transportation-related use of the privately owned covered hopper cars. Based upon this study, LOSAC believes that the overall level of transportation-related use of such cars to be in excess of 85 percent, while the carriers dispute this level. In addition, the parties pursued a study of the costs of ownership for privately owned covered hopper cars. Because of the time lag involved in obtaining the basic data, the cost study was based upon expenses and miles for the year 1973. An agreement was reached as to the method of indexing such data to the year 1974, but no agreement could be reached on indexing such data to later years or on a continuing basis. During the 1973-1976 period, the mileage allowance rate was increased twice. Subsequently, an interim multilevel schedule of allowances for privately owned covered hopper cars became effective. SECAC also has been negotiating and pursuing utilization and cost-of-ownership studies with the railroads after filing a complaint with the Commission in docket No. 36230. The results of the study on the utilization of RB, RBL, and LU cars were being collected and tabulated at the time of this proceeding, while the cost-of-ownership study had not begun.

Some of the respondents agree that the rates of compensation for railroad-owned cars should be applied to privately owned cars. Others have no objections to imputing railroad costs to private cars. LOSAC and Tennessee Eastman Company believe that the form of compensation for privately owned cars does not necessarily have to be the same as for railroad-owned cars.

Certain shippers argue that the cost of ownership for private cars should be the same as railroad-owned cars. SECAC, Tennessee Eastman and Georgia-Pacific contend that cost information for private cars can be obtained through various industry organizations. Pullman Leasing Company supports this contention in that it has supplied the AAR in the LOSAC case with cost-of-ownership data. Pullman asserts that this information is highly confidential and sensitive and should be consolidated with the data from other car companies to preserve its confidentiality. SECAC states that if the allowance structure were based on original cost and age brackets, as is the case with the present time/mileage system for railroad-owned cars, no cost-of-ownership studies would be required since capital costs (depreciation and interest) can be mathematically computed. Depreciation and interest costs are simply functions of the two variables and no studies are required to determine them. LOSAC supports this contention and deems that the only study which may be required would be to determine maintenance and repair costs. Allied believes that the original cost of all tank cars and all covered hopper cars are now on file with the AAR's UMLER system.

A few shipper respondents raised the question of valuation ceilings on privately owned cars. Such a ceiling would impose a limit on how much a railroad would pay for use of a private car, regardless of how much it costs the owner. Some of these respondents deem that since there is no maximum-value limitation on railroad-owned cars for costing and grouping purposes, there should be none for private cars. E. I. DuPont De Nemours and Company points out that the question of value ceiling in private cars was brought about by the use of multilevel scales in covered hopper and tank car compensation. DuPont believes that the Commission would not have placed a value ceiling on tank cars if it had the evidence of values beyond $25,000. DuPont urges the Commission to avail itself of the information contained in the AAR UMLER car file records for determining the current value of private cars placed in service during the last 3 years. Tennessee Eastman suggests that the Commission should conduct a separate study of the compensation paid for shipper-owned equipment, with specific emphasis directed at the valuation ceiling. Manufacturing Chemists Association, Inc. (MCA) proposes that a maximum of not less than twice the average cost for each particular type of car acquired during the most recent 3-year period be used as a guideline for setting the value ceiling for private cars.

Several of the shipper respondents address the issue of transportation use. Some shippers argue that the Commission's definition of transportation use for railroad-owned cars should be applied to privately owned cars. Fruit Growers Express Company believes that its free-running cars are utilized in essentially the same manner as those of the rail carriers and that the active car-days for Fruit Growers' vehicles should be defined as for railroad-owned cars. Tennessee Eastman describes its privately owned cars as instrumentalities of transportation and believes that, as such, they are in transportation use from the day of their arrival at the point of first use. SECAC states that there is no significant nontransportation-related use of privately owned RB, RBL, and LU cars. LOSAC contends that the major area of controversy relating to transportation use between it and the railroads is with respect to the "queuing" time (time during which a car is waiting for a load). LOSAC considers "queuing" time to be transportation related. In addition, LOSAC believes any time during which a car is incurring demurrage charges, regardless of other factos, should be considered transportation related. LOSAC asserts that the only major nontransportation-related use of private cars is when they are being used as warehouses and are not subject to demurrage. General Mills, Inc. suggests that private cars which are exclusively or largely used for transportation should be compensated on the same basis as equivalent railroad cars, i.e., time/mileage. By contrast, private cars that are used extensively for storage or encounter extensive out-of-service periods should be compensated on a basis that reflects only actual transportation service use, i.e., mileage. DuPont suggests that a joint owner-user study under the auspices of the Commission be initiated to provide a definition for transportation use for private rail cars. The United States Railway Equipment Co. (USRE) concedes that some analysis will be necessary to determine the transportation use of privately owned cars.

Several respondents agree that there is no need for the Commission to review any contracts, agreements or arrangements between shipper and private car lines or between railroads and private-car companies. General Mills and Archer Daniels Midland believe that the Commission should review the OT-5 agreement used by the railroads to establish the guidelines for the use of private cars. They argue that without the railroads' approval on such an agreement, the railroads will not move or use noncarrier owned equipment, and compensation will not be paid for such cars. Georgia-Pacific and General Foods feel that the terms of any contract, agreement or arrangement for the use of cars not owned by a carrier should not exempt the parties thereto from the car compensation formula except under special circumstances.

General Foods urges the Commission to include in its final rules, regulations, and practices with respect to railroad car service a provision that all railroads be required to handle/use a shipper supplied freight car in regular railroad service for the economic life of the car. The Construction Aggregate Rail Shippers Conference (CARS) calls upon the Commission to revise the car service rules in order to put the responsibility for car supply on the railroad which originates the traffic.

General Mills is concerned about the possibility that, under new Commission guidelines, compensation to private car lessees for use of their car may exceed their lease payments to the car owner and violate the Elkins Act and section 15(15) of the Interstate Commerce Act. To avoid inadertent violations of these acts, General Mills suggests that the Commission determine the maximum payments that may be made to private car owners or lessees.

Railroad respondents.—Railroad respondents contend that the notice of proposed rulemaking is premised on the erroneous assumption that the Commission must prescribe a private car compensation formula in order to comply with section 212 of the 4R Act. They argue that this assumption is incorrect because the Commission has had the authority, since enactment of the Transportation Act of 1940, 54 Stat. 901, to establish rules, regulations, and practices covering private cars. The railroads note that the Commission itself has recognized this authority. ***Keith Ry. Equipment Co.*** v. ***Assn. of American Railroads***, 274 I.C.C. 469 (1949). While the wording of section 1(14)(a) as amended by the 4R Act is slightly changed, the carriers assert that the power of the Commission has not been changed.

The carriers contend that the notice erroneously states that " *** amended section 1(14)(a) specifically requires *** that per diem be established for shipper and other privately owned cars." The railroads insist that this statement is incorrect since amended section 1(14)(a) requires no particular form of compensation for private cars. They point out that for many years the railroads, private car owners, and the Commission have construed "per diem" as being the compensation between railroads for the use of foreign-hire cars. The compensation paid private car owners has been "mileage allowances" as provided in Mileage Tariff 7-F, I.C.C. H-68. The carriers assert that if Congress had desired a formula for compensation which would be common to both railroad cars and private cars, it could easily have said so.

The railroad respondents argue that there can be no automatic assumption that present private car mileage allowances are inadequate or should be changed. They believe that this should be investigated in a separate proceeding. The carriers point out that compensation for private car owners has always been determined in proceedings separate from those involving railroad per diem and that section 212 of the 4R Act does not require any change in that procedure. Furthermore, the railroad respondents insist that there can be no shift from the present private car mileage allowance system to a time/mileage system without extensive studies.

The carriers maintain that there are substanital differences between the transportation use and handling of railroads cars and private cars. They list the following differences: "(1) Private cars spend much of their time being used for storage rather than movement. (2) Private cars are used to supply base needs with railroad cars being resorted to only meet costs of exceptional traffic levels. (3) Since private cars are constantly under shipper's or owner's control with respect to routing, interchange, loading, and unloading, railroads would be hindered from minimizing payments made by them since they lack control over private car utilization. (4) Private cars are not subject to mandatory car service rules. (5) Private cars subject to Mileage Tariff Series have many exceptional privileges not applicable to railroad cars. (6) Since private cars, unlike railroad cars lack a "home," it will be difficult if not impossible to turn time charges "off" and "on." (7) The cost of ownership of private cars is not available to the Commission *via* any uniform system of accounts. Even if private car costs were available, if would still be necessary to adjust for accoutrements or other construction not required by the railroads. (8) Railroads, as users of railroad cars, have the burden of user responsibility repairs and also bear the full cost of accidental destruction of freight cars; whereas private owners have neither burden."

UP/Conrail respondents and CNW believe that the Commission's proposal to apply rates of compensation for railroad-owned cars to privately owned cars would inevitably contravene section 15(15) of the act and result in possible violations of the Elkins Act. The carriers assert that both the Commission and the courts have held that a carrier may not pay an allowance in the absence of a published tariff provision to that effect and that the allowance may in no instance exceed the cost to the owner or the reasonable value represented by the service. The lower of these two sums represents the maximum payable. Therefore, the carriers insist that actual costs associated with privately owned cars are indispensable for any decision to prescribe private car rates.

SP believes that a more sharply defined picture of the cost, use and movement of shipper-owned equipment should be obtained before any general formula should be devised to cover compensation of shipper-owned fleets. According to SP, railroads may be presumed to be motivated in their car purchase decisions by a desire to provide rail equipment at lowest cost consistent with the needs of the transportation uses to which the equipment will be dedicated, but no comparable presumption reasonably attaches to shipper decisions to purchase equipment. The uses to which the latter equipment will be dedicated are not simply transportation uses, but transportation uses plus an unquantified shipper-purpose use.

SP does not support extension of the railroad per diem formula to shipper-owned equipment. However, SP believes that it would be possible to modify the SUR to include private cars. This modification can be done by ascertaining, through special studies and sampling, a shipper-purpose use factor. The carrier states that this shipper-purpose factor would determine the number of days in the transportation year in which the car is devoted to the shipper's purposes as distinguished from transportation uses. Thus, the SUR formula could be revised by applying the shipper-purpose use factor to the total time related costs so that such costs can be excluded. The remainder of the time related charges could then be treated as in the case for railroad-owned cars in the application of the SUR.

CNW advocates that rules be established to govern payment in situations where the rates do not depend upon the shipper providing the car and where the carrier is ready, willing and able, upon reasonable demand, to furnish said car. The railroad believes that when a carrier is prevented or not allowed to perform the service by action of the shipper, i.e., where the carrier is ready, willing and able to furnish it own equipment and the shipper is unwilling to allow the carrier to furnish that equipment, the shipper should not be entitled to an allowance. According to CNW, particularly in times of car surpluses, some shippers demand the right to use their private cars when rates are not dependent on use of private cars even thought the carrier is able to furnish the equipment. Furthermore, CNW believes that rules should also be established to identify circumstances where use of private cars exceeds the carrier obligation to provide the equipment, i.e., where private cars are used for "plant purposes."

Replies of shipper and private car company respondents.—Many shipper respondents continue to press their belief that the Commission's interpretation of the 4R Act is correct and that it can and should consider private car compensation in this proceeding. They argue that the railroads have misread the 4R Act. A few respondents reiterate their positions that compensation which is applied to railroad-owned cars should also be applied to privately owned cars. Pillsbury points out that 78.4 percent of the total railcar fleet is owned by class I railroads, while 69.0 percent of the covered hopper cars are railroad-owned. Pillsbury argues that a formula for car compensation that is reasonable for the majority of the railcar fleet should equally apply to the balance of the cars that are other than railroad-owned. The National Industrial Traffic League (NITL) suggests that compensation applied to privately owned cars does not necessarily have to be the per diem rates applied to railroad-owned cars.

In its reply statement, Archer Daniels Midland continues to urge the Commission to review the OT-5 agreements between railroads and shippers. The shipper suggests that the Commission rule that any carrier who declines to grant or who cancels an OT-5 agreement be obligated to provide all such equipment on demand and that all shippers served by such carrier be treated equitably.

Carnation Company and Fruit Growers Express reply to the railroads' contention that application of per diem to private car increases the possibilities of violations of the Elkins Act and section 15(15) of the Interstate Commerce Act. Carnation asserts that the carriers offered no evidence to support such an assertion. Fruit Growers Express argues that this contention has no relevancy to it because Fruit Growers Express is not a shipper and, therefore, can not receive an illegal rebate.

Several respondents take issue with the rail industry's eight alleged differences between the transportation use and handling of railroad cars and private cars. The shippers generally agree that certain types of private cars do spend some of their time for storage purposes. However, SECAC believes that under a time/mileage system, it is only a matter of determining this nontransportation time so that the shipper would not be paid for the time the car is being used for storage. Fruit Growers Express asserts that storage time has no applicability to it because Fruit Growers Express merely supplies equipment to the railroads for the movement of commodities owned by third parties. Allied Chemical submits that if a system were adopted in which private cars were compensated only for the time the cars were in the possession of the railroads, plus the free time provided in Demurrage Tariff 4-J, there would be no storage time problems.

According to shipper respondents, the railroad contention that private cars are used to supply base needs with railroad cars being resorted to only meet costs of exceptional traffic levels is not valid. The shippers argue that the carriers have control over the supply of private cars by virtue of the OT-5 procedures. Fruit Growers Express states that its equipment is furnished solely on an "as needed" basis, oftentimes only during peak loading periods.

The shippers dispute the railroad assertion that because private cars are constantly under shipper control, the carriers would be hindered from minimizing the compensation payments on such cars. They argue that there is no difference between private cars and railroad-owned cars in this respect. Railroad-owned cars are also constantly under the shipper's control with respect to routing, interchange, loading and unloading. In addition, Archer Daniels Midland asserts that railroad-owned cars which are assigned to a shipper are used to the same extent as if the shipper were using private cars. The respondent notes that such assignment of railroad-owned cars for shipper's exclusive use is a common practice.

Shipper respondents fail to see how private cars not being subject to mandatory car service rules has any relevancy. They state that a large number of railroad-owned cars are exempt from mandatory car service rules. The respondents point out that railroad assigned cars are exempt entirely from the provisions of Car Service Rules 1 and 2. SECAC notes that there are 13 railroads, including the Milwaukee, MoPac and Southern, that have reciprocal car service rule exemptions.

Shipper respondents also observe that the railroads do not specify what exceptional privileges shippers are accorded by the mileage tariff. Therefore, most of the shippers find that they are unable to respond to this contention.

Several shippers take issue with the railroad contention that because private cars lack a "home," it would be difficult to turn time charges off and on. MCA asserts that private cars do have homes. These homes are private sidings or tracks leased from railroads for the purpose of storing cars by shippers or private car companies. USRE submits that the time charge clock can be handled by the car-day divisor. SECAC believes that while there is a difference between railroad-owned cars and private cars in this regard, it can be resolved. SECAC points out that SP concedes that railroads per diem can be modified to apply to private cars. However, SECAC does not agree with the SP method because it would adjust nontransportation use by deducting the nontransportation-related cost, as well as by adjusting the car-day divisor so as not to pay for nontransportation time. Obviously, SECAC asserts, this would deduct the same amount twice. Fruit Growers Express contends that this railroad assertion primarily involves shippers and not it. Fruit Growers Express submits that under contract it could designate several points as home on certain railroads.

Many shippers respond to the alleged difference raised by the railroads that the cost-of-ownership data for private cars are not available to the Commission by any uniform system of accounts and even if the data were available, it would be necessary to adjust for accoutrements. A few of the respondents continue to press for imputation of railroad cost data to privately owned cars. MCA asserts that car ownership costs predominantly comprise capital charges associated with car value and there is no controversy peculiar to private cars bearing on car value. Such differences as may exist in the repair experience of private versus per diem cars are not likely to be consequential. SECAC contends that most cost-of-ownership data is simply calculated on the basis of value brackets and age and does not depend on having a cost study of each individual car. Fruit Growers Express points out that pursuant to section 20(6) of the act, it is required to submit an annual report to the Commission. Under this statutory provision the structure of Fruit Growers Express' system of accounts is determined by the Commission. As for accoutrements, a few respondents state that their private cars contain no unnecessary equipment or extraordinary devices.

According to some shipper respondents, the railroads incorrectly assert that there is a difference between railroad-owned cars and private cars because the railroads must bear the cost associated with the accidental destruction of cars and user responsibility repairs.

Such liability is inherent in the business of running a railroad and applies whether the carriers are using private cars or foreign line railroad cars. MCA states that these costs are not included in the repair expense reimbursable by and under the car-hire table. MCA notes that the Commission stated in the *Burlington* case, *supra*, 332 I.C.C. 176, 189, that:

> Repairs made necessary by improper use and handling of the car are not considered ownership responsibility items, and the costs are customarily borne by the responsible railroad. For the purpose of computing per diem rates, ownership repair costs are those made necessary by ordinary usage, and the maintenance normally required to keep the car in good operating condition.

Replies of railroad respondents.—Railroad respondents reiterate their views that due to the complexity of the problems surrounding compensation for private cars, a separate proceeding should be insituted. The carriers continue to argue that the differences between railroad and private cars warrant different treatment. They assert that the acquisition cost of most comparable freight car types is higher for private than railroad cars because carriers purchase in larger volumes and many private cars have special, more expensive features or components. The railroads submit that maintenance and repair costs for private cars are less than railroad-owned cars, principally because repairs on private cars are performed in nonrailroad contract shops with lower labor rates and overhead. The carriers continue to insist that the transportation use of railroad cars differs from use of private cars because the latter group has shipper purpose in addition to transportation uses. According to the railroad respondents, the joint utilization study of covered hopper cars referred to by LOSAC revealed that 52.5 percent of the total car-days involved railroad custody and 47.5 percent of the car-days involved shipper or receiver custody. In the opinion of the railroads, approximately one-third of the total car-days in the study were attributable to shipper purposes and not to transportation-use factors.

The carriers point out that in order to administer any type of time/mileage compensation system for private cars, the original cost values of such cars must be included in the AAR's UMLER file by individual car. The railroads assert that such information is not currently available and that some private car owners have refused to provide such data. In addition, the carriers contend that expensive modifications would have to be made to the present railroad car accounting systems in order to capture and incorporate private car placement and release information.

The railroads contend that a value ceiling must be placed on private cars to restrict the value to that required for transportation use. Some private cars have various "packaging" features or appurtenances for the owner's own convenience. The carriers submit that it was demonstrated in the LOSAC cost-of-ownership study that private cars do cost more than comparable railroad cars. A comparison of ledger values of the private covered hopper fleet as sumbitted in that study shows that their average ledger value per car is 23 percent more than the average railroad-owned covered hopper.

The rail respondents continue to argue that the Elkins Act and section 15(15) of the Interstate Commerce Act put a ceiling on private car compensation equal to the cost of furnishing the cars or the reasonable value of their use, whichever is lower. Therefore, railroads' cost of ownership cannot be imputed to private cars. In addition, CNW submits that to suggest that shippers' cost of capital for cars is as high as the railroad industry's is not supported by the evidence. CNW believes that matters such as investment tax credit, accelerated depreciation, level of risk, and other accounting/financing matters affecting private sector costs may and most likely are substantially different from their counterparts found in the rail industry.

N&W points out that several shippers complained about the OT-5 agreements used by the railroads to establish the guidelines for the use of private cars. The carrier asserts that the Commission has held that the railroads have the right to furnish the cars for transportation and also have the right to refuse to use private cars. This authority to exclude private cars completely would also encompass the lesser power to accept private cars on specified conditions, according to N&W. These conditions are set forth in the OT-5 agreements. N&W contends that any diminution of the railroads' power to prescribe the conditions for the use of private cars would inevitably prompt more decisions to exclude private cars entirely. Simiarly N&W argues that any extension of time/mileage per diem to private cars would make the use of such cars less attractive to the railroads and could lead to refusals to authorize loading of private cars.

Discussion and conclusions.—In the notice of proposed rulemaking we stated that the 4R Act requires the Commission to consider compensation to be paid for the use of shipper-owned cars and cars owned by private car companies. The railroad respondents argue that we have misconstrued the meaning of the changes made to section 1(14)(a) by section 212 of the 4R Act. They assert that the Commission has had the authority to set private car compensation prior to the enactment of the 4R Act and that the changes made by it have not altered this power. We agree with the carriers that the Commission has had the authority to establish rules, regulations, and practices covering private cars for many years prior to the enactment of the 4R Act. However, we believe that Congress in enacting section 212 intended, *inter alia*, that the Commission reexamine these private car rules and regulations, including compensation.

In section 212(a) of the 4R Act, Congress amended the parenthetical explanation contained in section 1(14)(a) to read "(and whether or not owned by another carrier, *shipper, or third party.*)" (Changes italicized.) Section 212(b) of the 4R Act states:

> The Commission shall, within 18 months after the date of enactment of this Act, revise its rules, regulations, and practices with respect to car service, in accordance with the amendment made by subsection (a) of this section.

We deem that the addition of the words "shipper, or third party" to section 1(14)(a), as well as the consideration provided by section 212(b) of the 4R Act, was intended to require the Commission to review private car compensation.

The carriers assert that we erred by using the term "per diem" in our statement on page 2 of the notice which states:

> Amended section 1(14)(a) specifically requires that compensation for the use of freight cars be determined "for each type of freight car" and that *per diem* be established for shipper and other privately owned as well as railroad-owned freight cars. [Emphasis added.]

It is true that the term "per diem" is not used in section 212 with respect to railroad or private car. Our use of "per diem" was meant to be synonymous with the word "compensation" in this statement. Prior to issuance of the notice, we had not determined what type of compensation system would eventually be used for private cars. One of the reasons this proceeding was instituted was to establish whether the present private car mileage compensation system was adequate or whether it should be changed to a time/mileage or other system.

The railroad statements provided a unified position against the establishment of a time/mileage system of compensation for private cars. However, SP does acknowledge that it may be possible to modify the SUR, which some of the carriers believe should be used in the railroad compensation formula, to include private cars. SP submits that before this ratio can be modified special studies and sampling will be necessary in order to ascertain a shipper-purpose use factor. Many of the shipper and private car company respondents favor the establishment of a time/mileage compensation system for their private cars. Nevertheless, a few of these respondents still endorse the mileage allowance system.

The carriers provide several reasons why a time/mileage system of compensation for private cars would be difficult to implement if not impossible to establish. In our opinion the shippers adequately rebut these railroad assertions in their reply statements. However, there are many differences of opinions between the railroads and the shippers and among the shippers themselves concerning several aspects of developing a compensation system for private cars.

Cost of ownership for private cars is one of the aspects where there is considerable controversy. Some shippers support imputing railroad costs to private cars, while other shippers submit that cost information for private cars can be obtained through industry organizations. SECAC believes that if the allowance structure were based on original cost and age brackets, no cost-of-ownership studies are necessary since capital cost can be computed mathematically. LOSAC supports this position and believes that the only study which may be requied would be to determine maintenance and repair costs. The railroads argue that original costs of comparable freight car types is higher for private than railroad cars because carriers purchase in larger volumes and many private cars have special equipment. According to the carriers, the LOSAC cost-of-ownership study of the privately owned cover hopper fleet showed that the average ledger value per private car was 23 percent higher than the average railroad-owned cover hopper. CNW suggests that the cost of capital for large shippers may be lower than that of the railroad industry because of such items as investment tax credits, accelerated depreciation, level of risk, and other accounting/financing matters affecting private sector costs. The carriers also contend that maintenance and repair costs are lower for private cars because they are performed in nonrailroad contract shops.

We believe that determination of the acquisition cost of private cars is necessary in order to establish a compensation system for such equipment. Whether the original cost can be obtained through various industry organizations or alternatively through cost-of-ownership studies should be investigated. The record indicates that SECAC and AAR are in the formative stages of conducting a cost-of-ownership study on RB, RBL and LU cars. In addition, there seems to be a need for the examination of the cost of capital associated with the private car owners. Furthermore, more data covering the costs related to the maintenance and repair of private cars should be assembled.

Controversy also surrounds the transportation use of privately owned cars. Some shippers believe that the transportation use of private cars is the same as that of railroad-owned cars. Other shippers feel that there is a need to study and analyze the utilizations aspects of private cars. General Mills suggests that private cars which are exclusively used for transportation should be compensated on a time/mileage basis and those cars used extensively for storage should be compensated by a mileage allowance system. The railroad respondents argue that the transportation use of private cars is different from that of railroad cars because the former group has shipper-purpose uses in addition to transportation uses. SP contends that special studies of private car utilization are necessary in order to determine shipper-purpose use. We conclude that in order to establish a realistic system of compensation for privately owned cars there is a need for studies dealing with the transportation use of the various types of private cars. Until more information is ascertained on this aspect of private car ownership, it is not possible to determine whether private cars should remain under a mileage allowance compensation system, be changed to a time/mileage system, a combination of both, or some other system as determined to be most appropriate.

The railroads argue that applying rates of compensation for railroad-owned cars to privately owned cars could contravene section 15(15) of the Interstate Commerce Act and result in violations of the Elkins Act. General Mills also shows concern that, under new Commission guidelines, compensation to private car lessees may exceed the lease payments and violate the above mentioned statutes. The 4R Act requires that:

> Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts and labor).

The Commission is well aware that the private car owners cannot be reimbursed for more than their ownership costs as defined by the 4R Act. Therefore, any revision in the private car compensation system which the Commission may make will take this fact into consideration.

All parties have made very convincing arguments for their respective positions concerning private car compensation. Unfortunately, these arguments are supported by little or no factual data and information on which to make a reliable determination as to what type of compensation system should be established for privately owned cars. It is absolutely essential that more data and information be gathered and analyzed before any firm decision can be made as to whether the present mileage allowance system of compensation for private cars should be continued with some modifications or whether a time/mileage system should be established. Therefore, a separate rulemaking proceeding will be instituted for the determination of the method of compensation for all privately owned cars, other than tank cars.

CONTRACTS OR AGREEMENTS FOR USE OF CARS NOT OWNED BY A CARRIER

In our notice of proposed rulemaking we requested comments regarding whether the terms of contracts, agreements, or arrangements for the use of cars not owned by a carrier should exempt the parties thereto from the prescribed formula, and whether the Commission should review such contracts, agreements, or arrangements.

The railroads that responded are in agreement that the terms of any contract, or arrangement for the use of freight equipment not owned by a railroad should be exempt from the prescribed formula and Commission review. Santa Fe believes that such contracts, which it presumes would include arrangements such as those with Railbox and Trailer Train, must be flexible in fixing compensation and, therefore, should, by their terms, be exempt from the basic per diem formula regulations. The 19-Road Group also believes that railroad refrigerator car companies should be excluded from the formula. The 19-Road Group points out that in Finance Docket No. 27590 the Commission has approved the policies of Railbox and Trailer Train and allowed these companies to establish rates and charges within the leeway contemplated by the pooling agreement. They add that there is no need for any renewed consideration of the treatment of pooling agreements of Railbox and Trailer Train by the Commission or for prescription of a per diem formula for these cars in lieu of arrangements reached on a voluntary basis among the railroads involved.

The railroads maintain that there have been no controversies or problems concerning lease arrangements that have not been settled amicably between the parties themselves and, therefore, the Commission need not be further concerned with this question. WP adds in its initial statement that it has no objection to the Commission's review of the terms of such contracts or agreements upon complaint of an interested party or upon its own initiative without complaint.

In general the concensus among shippers responding is that the Commission has no need to interfere in contracts between shippers and a private car company or railroads and a private car company. Tennessee Eastman, which is a manufacturing division of the Eastman Kodak Company, indicates that it fails to see any need for the Commission to review contracts, agreements or arrangements that it may have with a private car company for the purchase or lease of private rail equipment. Instead, it believes the Commission should confine its activities to the relationship between the shippers and the railroads, with such activities directed at seeing that shippers are paid reasonable compensation for furnishing such equipment.

General Foods submits that except for rates and charges promulgated under the terms and conditions of Ex Parte No. 331, *Publication of Separate Rates for Distinct Rail Services,* there should be no exemption from the prescribed formula. It states that to provide otherwise could be a basis for discrimination and special treatment.

The United Railway Equipment Company (USRE) refers the Commission to the decision of the Supreme Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.* at 308 U.S. 422 which reads:

> Freight cars are facilities of transportation as defined by the Act. The railroads are under obligation, as part of their public service, to furnish these facilities upon reasonable request of a shipper, and therefore have the exclusive right to furnish them. They are not, however, under any obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a position to furnish them according to the demand of the shipping public, *and if the carriers do so lease cars, the terms under which they obtain them are not the subject of direct control by the Interstate Commerce Commission.* [Emphasis added.]

USRE believes that the Interstate Commerce Commission should not become involved between lessors and lessees, be they shipper or railroad.

The Georgia Pacific Corporation, which is basically a manufacturer of wood products believes that if the Commission desires to minimize carriers' internal costs and standardize car compensation, there should be no exemptions except under special and extenuating circumstances.

The Fruit Growers Express Company (FGE) is a refrigerator carline in the business of furnishing specialized rail equipment and protective services for the transportation of perishable commodities. It is a railroad controlled company. Unlike all other refrigerator car lines which generally have "borrowed" the reporting marks of their parent railroads, FGE's unassigned or "free running" cars bear FGE marks. While the other refrigerator carlines receive per diem payments based on a time/mileage formula for use of their equipment, FGE for use of its approximately 3,407 free running cars receives only the applicable mileage allowance set forth in the mileage tariff established by the Association of American Railroads and approved by the Interstate Commerce Commission.

FGE claims that the mileage revenue it receives for the use of its free running equipment bears no relationship to its ownership costs, and submits its need for a compensation based on a time and mileage formula.

In regard to the issue of the exclusion of parties to a contract from the per diem formula and the Commission's review of such contracts, FGE states that it is well established that leasing arrangements between private carlines and shippers are not subject to review by the Commission under any section of the Interstate Commerce Act. *Tank Car Allowances, Southern Ry. System,* 329 I.C.C. 466, 481 (1967). FGE continues by stating that such leases are simply a means by which shippers obtain transportation units, and are no different than a simple purchase agreement. It submits that rental of equipment, per se, is extraneous to the determination of rates paid by handling railroads, and that rental arrangements and per diem rates are conceptually and legally separate. It further argues that the terms of such contracts or arrangements are not reviewable under section 1(14)(a) of the act.

Similar arguments against exemptions from the per diem formula were voiced by General American Transportation Corporation, North American Car Corporation, Shippers Car Line Division of ACF Industries, Inc., and Union Tank Car Company.

General Mills, Inc., and Archer Daniels Midland Co., believe that this Commission should review the OT-5 agreements used by the railroads to establish guidelines for the use of private cars. OT-5 agreements are entered into between carriers and private car owners or lessees for permission to use the cars on railroad property. The agreements are executed preparatory to the execution of leases of cars by the lessees from car manufacturers. General Mills states that the leases typically must be for 10-year periods, in order to lease a car from an equipment manufacturer at a reasonable cost, whereas OT-5 agreements typically must be for only 1 year; consequently, transportation users may sign long-term leases for cars but may be limited to use of those cars for only one year. General Mills believes that this Commission should review OT-5 agreements to determine whether they are reasonable, whether they encourage or discourage car acquisition, whether they should be required to run concurrently with the lease contracts, and whether they should be modified in any way. General Mills and Archer Daniels contend what without the railroads' approval on the OT-5 agreements, the railroads will not move of use noncarrier owned equipment and that compensation will not be paid for such cars. Archer Daniels suggests that the Commission rule that any carrier which declines to grant or which cancels an OT-5 agreement be obligated to provide all such equipment on demand and that all shippers served by such carrier be treated equitably.

Georgia-Pacific and General Foods contend that the terms of any contract, agreement or arrangement for the use of cars not owned by a carrier should not exempt the parties thereto from the car compensation formula except under special circumstances. General Foods urges this Commission to include in its final rules, regulations, and practices with respect to railroad car service a provision that all railroads be required to move or use a shipper supplied freight car in regular railroad service for the economic life of the car. The Construction Aggregate Rail Shippers Conference calls upon the Commission to revise the car service rules in order to put the responsibility for car supply on the railroad which originates the traffic.

As to the question whether the terms of contracts, agreements, or arrangements for the use of cars not owned by a carrier should exempt the parties thereto from the prescribed formula, our answer is "no." The railroads have presented little, if any evidence, to support such an exemption. Moreover purchase and leasing agreements between shipper and private car companies, and railroads and private car companies, have not in the past and we do not contemplate that in the future that they would include any language or provision exempting the parties from a per diem or allowance formula. Such contracts and agreements are based on fair consideration for the use of the cars (rental) which is separate and distinct from the concept of a per diem compensation. In fact in determining the per diem charge the actual rental value of the car is not a relevant factor to be considered.

Per diem charges do not apply to sale, lease, pooling or other arrangements employed to provide cars in the first instance to owners or lessees for use in the national fleet. Per diem applies only to compensation paid by railroads to railroads or private-car owners or lessees when the railroadt carriers use foreign cars on their own lines. The only exception from the per diem compensation formula is Railbox and Trailer Train, since the Commission has already recognized the importance of these entities in establishing their own rates. We do not include FGE or any other railroad controlled companies as exceptions to the per diem formula. FGE is a distinct entity from Railbox and Trailer Train and no evidence has been presented that would warrant its exemption.

Finally, we also conclude that no need has been established for the Commission to regulate provisions other than compensation in contracts or arrangements involving the sale or lease of private cars to railroads or shippers. Unless, we are apprised of wrongdoing, or interference with the policies of the Commission, we find no necessity to police such contracts.

As to the OT-5 agreements, these are agreements between shippers or lessees and the railroads and are under our jurisdiction under section 1(14)(a) of the act. It appears that because the OT-5 agreements are often short term and may be canceled on short notice that they may create a hardship on long-term lessees of railroad cars, if the railroads find it in their interest to discourage the use of private cars on their lines. Since the issue of review of OT-5 contracts is related to the question of compensation for use of private cars, discussion of this issue will also be handled in the aforemention separate rulemaking proceeding.

LOCOMOTIVES AND OTHER VEHICLES

Although the proposed formula does not attempt to determine compensation for the use of locomotives by a nonowning railroad, concerned persons were requested to address the issue of whether it is necessary for the Commission to devise such a formula and how such a formula should be constructed. Eight of the 11 initial statements submitted by the railroads contain comments on these matters. All agree that locomotive compensation is not a matter that requires the Commission's attention, primarily because they are not regularly interchanged and because to the minor extent they are, interrailroad agreements on compensation, taking into account peculiar local operating conditions that often prevail, are readily worked out. Comment was also offered concerning compensation for use of work equipment by nonowning railroads. Here the same situation seems to prevail as with locomotives, i.e., to the limited extent such use takes place, amicable terms are easily arrived at.

We agree that the matter of compensation for use of equipment other than freight cars by nonowning railroads is not at this time a matter that warrants this Commission's attention. Historically the Commission has not been called upon to resolve disputes between carriers concerning compensation for use of locomotives and work equipment. The evidence of record indicates that they have been handled, if not preempted, through private agreements. The fact that these must take into account the myriad of local operating conditions, further indicates that such compensation is a matter for which compensation perhaps cannot successfully be prescribed on a rulemaking basis, i.e., through the promulgation of a precise formula. Accordingly, our attention in this proceeding will be confined to the compensation for the use of freight cars.

PENALTIES AND SANCTIONS FOR NONOBSERVANCE

The notice requested comment on whether the Commission should prescribe penalties and sanctions for nonobservance of its regulations relating to basic per diem. The participants responding to this question acknowledge the Commission's long held power in this regard, but they state that there is no need for the prescription of specific penalties at this time. In view of the participants' failure to indicate that violation of per diem regulations is a problem, this matter does not require further attention in this proceeding. Of course, should subsequent developments indicate specific penalties to insure compliance with per diem regulations are needed, we will reconsider this matter.

REMITTANCE OF DEMURRAGE

CNW contends that the effect of the regulation prescribed in Ex Parte No. 289, *Remittance of Demurrage Charges,* 353 I.C.C. 567

(1977), should be taken into account in this proceeding.[4] In Ex Parte No. 289 the Commission prescribed a rule requiring remittance to the freight car owner by a nonowning railroad, on whose lines a car is being detained under demurrage, of all demurrage charges collected in excess of $10 per car, per car-day. CNW contends that as a result of that regulation monies in addition to per diem will flow to the car owner or lessor, monies which will increase the return on investment and reduce the costs of ownership.

The proceeding in Ex Parte No. 289 is not administratively final; the taking effect of the rule prescribed in the report 353 I.C.C. 567 was stayed pending disposition of petitions for reconsideration. Therefore, at this time it cannot be said with certainty if and when this regulation will be made effective or what its final form will be, and any attempted analysis of the potential effect of the regulation as now prescribed could well be an exercise in futility. In any event, we do not believe that such a regulation as is contemplated in Ex Parte No. 289 will have so great impact on per diem considerations. If found necessary the regulation ultimately prescribed in Ex Parte No. 289 can be taken into account in revising the per diem formula.

INCENTIVE PER DIEM

The notice of proposed rulemaking made no mention of incentive per diem except in footnote 1, which stated:

> The term "Basic per diem" is used to distinguish the compensation computed on the basis of the first portion of Section 1(14)(a) from incentive per diem authorized by the last portion of Section 1(14)(a).

The railroads, nonetheless, raise the question whether incentive per diem should be suspended or entirely eliminated. Many of the railroad respondents contend that the basic car-hire rates that evolve from this proceeding will adequately compensate the car owner and render the present incentive per diem system superfluous. Other carriers argue that experience has shown that incentive per diem has not worked. The 19-Road Group contends that incentive per diem should be phased out as the additional basic per diem charges are phased in. A few railroads insist that elimination of incentive per diem should not be utilized as a "trade" for increases in basic per diem rates. N&W believes that the foundation for the present incentive per diem program will be removed when the basic per diem rates are revised in this proceeding. However, the majority of the respondents agree that incentive per diem is not an issue in this proceeding and that any modification, suspension or discontinuance of incentive per diem should be dealt with in Ex Parte No. 252 (Sub-No. 1), ***Incentive Per Diem Charges—1968.***

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[4] By petition filed April 25, 1977, CNW requested leave to file additional comments concerning the alleged impact of the regulation prescribed in Ex Parte No. 289 on the instant proceeding. Leave is granted, and the proffered comments are considered at this time.

The changes made in section 1(14)(a) of the Interstate Commerce Act by section 212 of the 4R Act relate solely and specifically to *basic* per diem charges. This proceeding was instituted with the objective of the adoption of a formula for computation of basic per diem charges. Whether or not incentive per diem should be suspended or eliminated is not at issue in this proceeding. If in the future, when the full effect of the revised formula becomes apparent, it can be shown that the level of basic per diem sufficiently provides an incentive to encourage the purchase, acquisition, and efficient utilization of freight cars, the railroads are free to file a petition in Ex Parte No. 252 (Sub-No. 1) requesting a review of the incentive per diem program. It should be pointed out that the Commission has underway an internal evaluation of the existing incentive per diem program with a view to determining whether it is effective and whether recommendations might be considered to eliminate, improve or strengthen the program.

SUMMARY

We find that the record in this proceeding supports and warrants adoption of the per diem formula as set forth in appendix III and as discussed in this report. We further find that the formula implements the mandate of the Congress set forth in the 4R Act to revise the Commission's rules, regulations, and practices with respect to car service, in order to encourage the purchase, acquisition, and efficient utilization of freight cars. The formula will determine the rate base at which car-hire compensation will be paid by railroads for the use of foreign cars owned or leased by other railroads.

We have categorized 15 types of freight cars. These types correspond to those published in "The Official Railway Equipment Register" and to those included in the Uniform System of Accounts. Pursuant to the congressional mandate, the formula which we have developed reflects consideration of the following factors which we have weighed in reaching our conclusions and which affect each of the car types.

The first factor is age and value brackets of the cars. The Car-Hire Rate Table (summary 4 of appendix III) employs narrowband, $1,000 value brackets and 1-year age brackets. This refinement in the classification of car types by age and value will produce per diem charges that more accurately reflect the true ownership costs for each individual car.

The second factor is depreciation. Rates of depreciation for each type of car are based on the average service life and salvage value determined from national railroad data. The rates are determined using statistical actuarial analysis of the data.

The third factor is repair costs. A 3-year moving average is used to develop average car repair costs while normalizing fluctuations in car repair activity resulting from inflation or deflation. It provides assurance that the car owner is reimbursed for an amount nearest to what it will cost to repair its cars. Until 3 years of reporting has been completed, the first year will stand on its own, the second year will employ a 2-year average, and the third year and thereafter will employ a 3-year moving average. Allocation factors are used to distribute various operating expenses. These factors with minor modifications are the same as have been used prior to this proceeding, and it is anticipated that they will be updated after freight car repairs are developed by each railroad based on the actual costs experienced and separated between ownership costs, other expenses, and general overhead items.

The fourth factor is cost of capital. A discounted cash flow method and the resulting development of a current cost of capital will be used to compute the current cost of capital for car compensation rates. This method considers the economic costs to the firm of the return required to provide the debt investors their interest and the equity investors their earnings. The current cost of capital is that cost of acquiring funds during the current period and is used to judge asset acquisition decisions. As such, the current cost of capital is only concerned with incremental additions to the capital pool, and imbedded debt and equity costs are disregarded. After release of the latest edition of "Transport Statistics in the United States," the current cost of capital will be developed using that year's data.

The fifth factor is transportation use. Pursuant to the 4R Act, the above-mentioned costs considered in this porceeding to determine the compensation for the use of freight cars must be related not only to the level and the adequacy of the national car supply but also to the transportation use of each type of car. Transportation use is a function of the time and distance which cars are used, and adherence to it avoids compensation for any costs related to providing cars for other uses. A car-day divisor and a car-mile divisor are calculated and incorporated into the formula to reflect transportation use of each type of car.

We have considered all of the above factors and made the above conclusions in order to develop the per diem formula. In addition, we have made the following conclusion in order to apply the formula.

We have concluded that we have inadequate factual data and information as to make a reliable determination as to what type of compensation system should be established for privately owned cars and, therefore, will consider this issue in a separate rulemaking proceeding.

We have also concluded that parties to contracts and agreements for the use of private cars cannot exempt themselves from the prescribed formula by the terms of such contract. Most such contracts are not related to car-hire compensation within the scope of this proceeding. We also have concluded that a review of contracts or agreements for the use of private cars is not warranted, with the exception of OT-5 agreements which will be considered in a separate rulemaking proceeding.

Furthermore, we have concluded not to modify the methods of compensation for locomotive or other vehicles. Existing methods of compensation for use of these vehicles between the railroads is adequate.

We have also concluded not to impose or establish penalties or other sanctions for nonobservance of basic per diem regulations, since no need for them has arisen in the past.

We have concluded that incentive per diem is a consideration inapposite to the issues of basic per diem presented within the scope of this proceeding. Ex Parte No. 252 (Sub No. 1), *Incentive Per Diem Charges—1968*, encompasses the issue.

Finally, we recognize that the formula and its application adopted herein may require further revision in the light of actual experience. Always anticipating further improvement and modification, this proceeding is being left open to facilitate this process.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER HARDIN concurred in the result.

APPENDIX I

NOTICE OF PROPOSED RULEMAKING

November 4, 1976

The compensation, commonly referred to as per diem or basic per diem,[1] due one railroad for the use of its cars by another railroad was prescribed by the Commission in 1968, pursuant to section 1(14)(a) of the Interstate Commerce Act, on the basis of a time and mileage formula, *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 332 I.C.C. 176. In the cited decision hereinafter referred to as the *Burlington* case at page 230, the Commission provided the following method for updating the per diem formula:

> We find that just and reasonable per diem rates shall hereinafter be calculated in the following manner and subject to the following instructions.
>
> Per diem rates shall be calculated using data for the last calendar year, and for the 3 most recent years as herein prescribed, to develop necessary statistics. Whenever such calculations indicate a need for revision of the rates, the fact shall promptly be brought to the attention of the Commission.

This formula has been updated a number of times by orders entered in docket No. 33145, *Railroad Freight Car Per Diem Charges*, and presently reflects car ownership costs for the years 1972, 1973 and 1974.

Section 212 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) has amended section 1(14)(a) and makes necessary the institution of this proceeding. Section 1(14) as amended by the 4R Act and as relevant to the issue of basic per diem provides as follows:

> (a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules,

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[1] The term "basic per diem" is used to distinguish the compensation computed on the basis of the first portion of section 1(14)(a) from incentive per diem authorized by the last portion of section 1(14)(a).

regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor).

(b) The Commission shall, within 18 months after the date of enactment of this Act, revise its rules, regulations, practices with respect to car service, in accordance with the amendment made by subsection (a) of this section.

The formula prescribed in the ***Burlington*** case, ***supra,*** did not distinguish among types of cars and was limited to the charges one railroad was to pay another railroad for the use of its cars. Amended section 1(14)(a) specifically requires that compensation for the use of freight cars be determined "for each type of freight car" and that per diem be established for shipper and other privately owned as well as railroad owned freight cars. These differences and others to be subsequently discussed, including the proposed adoption of a new uniform system of accounts for railroads, docket No. 36367, ***Revision to the Uniform System of Accounts for Railroads,***[2] make necessary the adoption of a new formula for determining basic per diem. Attached as appendix A is a proposed formula for the computation of basic per diem developed by the the Bureau of Accounts. Concerned persons are urged to comment on the proposed formula and/or suggest possible alternatives. Similarly, parties to this proceeding are asked to comment upon whether the terms of any contract, agreement or arrangement for the use of cars not owned by a carrier should exempt the parties to the contract, agreement or arrangement from the prescribed formula, whether the Commission should review such contracts, agreements or arrangements, and whether or not there is need for the Commission to prescribe "penalties or other sanctions for nonobservance" of Commission regulations pertaining to basic per diem.

GENERAL DISCUSSION OF NEW MATTER INCLUDED IN THE PROPOSED FORMULA

A. *Car type.*—Section 1(14)(a) as amended requires that the Commission establish reasonable rules, regulations, and practices with respect to car service, including the compensation to be paid for the use of freight cars by type of car. Following is the selection of car types for use in the proposed per diem formula:

Box—plain 40-foot
Box—plain 50-foot and longer
Box—equipped
Gondola—plain
Gondola—equipped
Hopper—covered
Hopper—open top-general service
Hopper—open top-special service
Refrigerator—mechanical

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[2] The formula adopted in this proceeding will be modified to conform to the uniform system of accounts ultimately adopted in docket No. 36367.

Refrigerator—nonmechanical
Flat—TOFC/COFC
Flat—multilevel
Flat—general service
Flat—other
All other cars
For more detail of the car types see appendix B.

The car types selected are the same as those published in "The Official Railway Equipment Register."

The proposed formula does not attempt to determine the compensation due for the use of locomotives by a nonowning railroad. Concerned persons are requested to address the issue of whether it is necessary for the Commission to devise such a formal and if necessary how this formula is to be constructed.

B. *Transportation use.*—Congress has provided in section 212(a) of the 4R Act that in determining basic per diem charges "the Commission shall give consideration to the *transportation use* of each such type of freight car." [Emphasis supplied.] The legislative history of this amendement is silent on how "transportation use" is to be defined.

In construing section 1(14)(a) prior to the 4R Act the Commission stated in the *Burlington* case, *supra*, at 187 that "Per diem charges may not include any amount for the value of the use of a car. See Cong. Rec. - House - May 12, 1966, page 9946."[3] Although the term "transportation use" as it appears in amended section 1(14)(a) could be construed to require that the per diem formula take into account the revenue customarily generated by a particular type of car or whether the car is under load or empty, it is believed that such a construction would introduce into the formula factors that cannot be verified on the basis of existing records. Accordingly the formula set forth in the appendix construes "transportation use" as the time and mileage of freight cars required for freight movement. It is measured in terms of active car-days in the formula to determine the rate of compensation per day. It is also measured in terms of car-miles per year that cars are moving which is used to determine a rate of compensation per mile.

It is probable that "transportation use" can be described and measured in a number of additional ways. Parties to this proceeding are invited to submit suggestions on this issue.

C. *Current cost of capital.*—The 4R Act requires due consideration be given to the current cost of capital. The cost of capital is recognized as adequate compensation to the suppliers of capital, debt and equity, for their respective contribution to the overall capital structure of the industry. The concept of current cost of capital emphasizes the cost associated with new infusions of capital from these sources. An overall cost of capital implies its application to all investments made by the industry and not solely to freight cars. For this reason all new sources of capital are considered and the overall debt-equity ratio is applied as a weighting factor for the debt costs and equity costs to arrive at the overall cost of capital.

Cost of debt is proposed to be developed from the interest rates and associated costs of new issues of funded debt, other than equipment obligations, and those of newly issued equipment obligations. Both these elements are weighted by their relative contributions to give an overall cost of new debt.

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[3] A further discussion of "value of use" may be found on page 202 of the cited decision.

The procedures and methodologies for developing the equity portion of the cost of capital will be a major issue in the proceeding to be instituted by this Commission relative to section 205 of the 4R Act. The intent here is not to prejudge the outcome of the rulemaking proceeding mandated by section 205, nor to duplicate the effort required. Due to the fact that the section 205 rulemaking will not be administratively final prior to the conclusion of this proceeding, an interim method of developing cost of equity will be utilized. Upon finalization of procedures under section 205, the development of the cost of equity under section 212 will be brought into conformance with the methodology and procedures set forth in section 205.

The interim procedure to develop the cost of equity is the Discounted Cash Flow (DCF) approach which uses market value as its criterion. By this procedure the major cost element associated with common stock ownership is looked at from the point of view of the stockholder. The corporation must generate earnings that will provide its dividend yield rate to the stockholder plus a capital gains appreciation in the market value of the stock. Realizing the volatility of market price, this latter element is perceived as a function of the organization's historical growth trend as expressed by the changes in its common stock market price expressed in constant dollars. The railroads are unique in that during the past 18 years using this test, they have experienced an average negative growth per year. The difference between this decline and the change in some standard over the same period would give a rate that, if substituted for the growth factor cited above, would, in theory, achieve a stable capital flow. For purposes of this interim procedure, the standard for comparison is given as the change in common stock market price (expressed in the same constant dollars over the same period) of a composite of corporation statistics published in "Moody's Transportation Manual." The cost of equity capital based on common stock is the same for retained earnings except for the exclusion of any flotation costs that may be involved.

The remaining element in determining the weighted cost of equity is the preferred stock. Its costs are fixed similar to debt, but, because it is technically an equity element, it is included in the weighted cost of equity.

The final step is to weight the cost of debt and cost of equity. This is accomplished using the long-term debt to equity ratio, and applying it to the respective debt and equity elements of the cost of capital.

Sources of data from which to calculate the current cost of capital utilizing the above procedure are:

a. Cost of Debt

1. Interest on new issues of funded debt—"Transport Statistics in the United States" (T.S.), table 148, for total column.

2. Interest on equipment obligations (not including conditional or deferred payment contracts)—T.S., table 148, Equipment Obligations column.

3. Interest on equipment obligations, conditional or deferred payment contracts—T.S., table 146A, Amount Obligations Issued and Average Rate of Interest (percent) columns.

4. Weighting factors—weighted on basis of dollar values of each item cited above.

b. Cost of Equity

1. Dividend yield rate—"Moody's Transportation Manual," Analytical Survey of the Railroads (Moody's), Common Stock Dividend Yield percent.

2. Adjustment to preincome tax—maximum corporate Federal income tax is assumed to be 48 percent.

3. Market price of common railroad stock—Moody's, Railroad Common Stocks--End-of-Month Averages, Market Price—weighted average—dollars per share.

4. Market price of common composite stock—Moody's, Common Stock Prices, Earnings, Dividends, Yields, and Price-Earnings Ratios—Annual averages, composite column.

5. Average yearly percent change—based on trended change over period, expressed as a percent and averaged for the number of years.

6. Preferred stock cost—Preferred dividend rate (a) Preferred Dividends—T.S., table 126. (b) Preferred Stock—T.S., table 158.

7. Weighting factor—rates weighted by dollars of new issues of preferred stock to dollars of total shareholders equity.

(a) Amount of new issues of preferred stock—T.S., table 146, section B, preferred column.

(b) Shareholders' equity—T.S., table 158.

c. Overall Weighting Factor—long term debt-to-equity ratio—T.S., table 158.

D. *Shipper and private car company cars.*—The 4R Act requires the Commission to consider compensation to be paid for the use of shipper owned cars and cars owned by private car companies.

The cost of ownership incurred by shippers and private owners is not available to the Commission. Suggestions from concerned persons as to how this information might be obtained are solicited. In view of the unavailability of such data, it is proposed that rates of compensation for railroad-owned cars be applied to all cars except tank cars.[1] As the ownership of tank cars by railroads is minimal, it appears inappropriate to impute railroad cost of ownership of this type of car to shipper and car company owners.[2] Tank car compensation will be implemented in a separate rule-making proceeding, Ex Parte No. 328, ***Investigation of Tank Car Allowance System***.

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[1] Public Law 94-210, section 306, prohibits discriminatory tax treatment of transportation property 3 years after enactment. Section 306(d) defines "transportation property." Shippers and other owners of cars should address the problems which might arise out of unequal tax treatment.

[2] Shipper owned and private car company owned cars compared the ownership of class I railroads as of 1975, shown in the 1976 edition of "Yearbook of Railroad Facts," Association of American Railroads is as follows:

Type	Class I railroads	Car companies and shippers
Boxcars:		
Plain	304,910	7,502
Equipped	170,179	879
Covered hoppers	156,850	70,029
Flatcars	98,320	42,218
Refrigerator cars	70,434	27,763
Stock cars	4,341	82
Gondolas	176,408	5,442
Hopper cars	346,413	10,053
Tank cars	2,951	167,907
Other freight cars	28,653	2,864
Total	1,359,459	334,739

DETAIL DISCUSSION OF THE FORMULA

The proposed formula, Rail Form H, 8-76 (hereafter referred to as RFH, 8-76) has been designed to determine the compensation to be paid for the use of freight train cars by type of car. The formula is similar, in most respects, to Rail Form H, 7-62, which is currently used to determine the compensation to be paid for the use of freight train cars.

The difference between the two formulas is that RFH, 8-76 produces compensation by type of car rather than all types of freight cars combined.

CONSIST OF COMPENSATION FORMULA

The proposed formula consists of the following:

Summary 1 - Distribution of Car Repair Ownership Costs by Type of Freight-Train Car
Summary 2 - Statistical and Repair Summary
Summary 3 - Summary of Investment Costs per $1,000 Original Cost
Summary 4 - Car-Hire Rate Table

Schedule 1-Separation of Rail Freight Operating Expenses, Rents, Taxes (excluding Federal Income Taxes) and Cost of Capital between Per Diem Freight-Train Car Ownership Costs and Other Costs.

Worksheet 1 - Computation of Percentages Used to Distribute Maintenance-of-Way and Structures Expenses and Maintenance of Equipment Expenses (other than freight-train cars) in Schedule 1, Sheet 1.

Worksheet 2 - Computation of Percentages to Use to Distribute Transportation Expenses between Ownership Costs, Other Expenses, and General Overhead in Schedule 1, Sheet 1.

Worksheet 3 - Computation of Percentage of Expenses not applicable to Nonrevenue Freight.

Worksheet 4 - Computation of Active Per Diem Car-Days and Per Diem Days Payable.

EXPLANATORY STATEMENT AND PROCEDURES USED IN COMPUTING COSTS SOURCE REFERENCES

In certain sections of the formula source references are to accounts or items in the annual reports of the railroads. It is the intent of the formula that expenses and other data may be taken from the appropriate sections of "Transport Statistics in the United States" for the particular year under study. Rail Form A references are not complete since revisions to Rail Form A will be necessary.

ALLOCATION FACTORS

Factors used to allocate various expenses were developed from the special per diem study conducted in conjunction with the *Burlington* case, *supra*. These factors have produced acceptable results over the years. In order to eliminate the need for a special study, at least for the present, we propose to use the same factors, with some modification, in the proposed formula.

The proposed accounting system in docket No. 36367, that the formula is based on, differs in significant respects from the present accounting system. These differences prevent the complete utilization of all the various factors developed in the prior study Because of this, it is proposed to use averages based on expenses reported in Rail Form H for the years 1970 through 1974, which have been submitted to the Commission by the Associaton of American Railroads (hereafter referred to as AAR) in its petitions in docket No. 33145 for per diem rate increaess.

The calculation of percentages used to distribute Maintenance-of-Way and Structures (excluding depreciation), Maintenance-of-Way and Structures—Depreciation, Maintenance of Equipment—other than freight train cars (excluding depreciation), and Maintenance of Equipment—other than freight train cars depreciation, is done on the basis of 5-year weighted averages shown in worksheet 1 of the formula. The calculation of the percentage used to distribute Transportation Expenses is done on the basis of a 4-year weighted average and is shown in worksheet 2.

An accounting change of January 1, 1971, transferring the cost of repairing journal boxes from account 402 to account 314 and certain transportation related costs from account 314 to account 402 made it necessary to delete 1970 figures in developing an average. The change caused a significant difference in the figures and if it were not deleted, the average would be distorted.

The third percentage used is a 5-year weighted average which breaks out the percentage of expenses not applicable to nonrevenue freight and is shown in worksheet 3.

PROCEDURES

SCHEDULE 1

1. Schedule 1, sheets 1 and 2, is used for the purpose of accumulating freight expenses and distributing them between ownership costs, other expenses, and general overhead. Factors have been developed (based on the *Burlington* study, *supra*) and are used to distribute maintenance-of-way, maintenance of equipment (other than freight train cars) and transportation expenses (excluding hire of freight cars). Other expenses items (with five exceptions) are distributed on the basis of factors developed from the *Burlington* study. The five exceptions are property taxes assigned to freight cars, hire of freight cars, cost of capital on freight cars, depreciation on freight cars, and freight car repairs. These charges are *not* distributed on sheets 1 and 2 of schedule 1. All of these (except hire of freight cars) are basic elements of the per diem rate and are used in the rate tables. Hire of freight cars is excluded because in a multilevel system of rates, this item is covered by the allowance for interest and return of capital (or depreciation). After all of the other expenses are accumulated and distributed to ownership, other expenses and overhead, the ownership portion is distributed to type of car, in summary 1, based on the distribution of ownership expenses developed on sheets 3.1 to 3.4 of schedule 1.

2. Schedule 1, sheets 3.1 to 3.4, is used to accumulate expenses of repairing freight train cars by type of car. These expenses include both items chargeable directly to type of car and those that must be prorated to type of car. In addition, all expenses must be separated between ownership costs and other expenses.

Direct charges include:

A. Account 020922—salaries, repair and maintenance employees.
B. Account 030922—miscellaneous paid time off, repair and maintenance employees.
C. Account 050222—car materials, new and rebuilt.
D. Account 090922—repairs billed by others.
E. Account 091022—repairs billed to others.
F. Account 160022—retirements.

Indirect charges include:

A. Account 040122 and 040222—Federal and State payroll taxes.
B. Account 040722—other fringes (health and welfare benefits, et cetera).
C. Account 010122, 020122 and 021022—salaries, officers and other employees.
D. Account 030122 and 031022—miscellaneous paid time off.
E. Account 040122 and 040222—Federal and State payroll taxes.
F. Account 040322 to 040722—other fringes (health & welfare benefits, et cetera).
G. Other expenses—accounts 060222, 060322, 070522 to 070722, 080022, 091222, 091322, 100322, 100522, 110122 to 110722 and 150022.

Under indirect charges, items A through F are labor-related and should be allocated to type of car based on direct labor charges. Other expenses, item G, should be allocated to type of car on the basis of the percentage of total repair expenses for each car type to the total freight car repair costs.

The separation of freight car costs between ownership costs and other expenses for each type of car should be made on the basis of the results of a special study made by the railroads. Such a study would probably be required periodically, or each time a request for an increase in per diem rates is made.

In the absence of a special study, freight car costs may be separated between ownership costs and other expenses on the basis of the percentages developed in the *Burlington* study adjusted to reflect accounting changes made effective in 1971 and the fact that payments for foreign cars destroyed will be charged to transportation expenses in the new system of accounts. The original figures are shown in work table 1, sheet 3 of 5 in exhibit R-1, docket No. 31358. The adjusted figures are shown in table 1.

SUMMARY 1

The distribution of car repair ownership costs by type of freight train car is made in summary 1 to the formula. The procedures used for this distribution are as follows:

1. Total car repair ownership costs (by type) as developed in schedule 1, sheets 3.1 through 3.4 develop percentages which are used to distribute other costs related to car repairs as shown in schedule 1, sheets 1 and 2 column (7) of the formula.
2. The total costs related to car repairs are distributed to type of car by the percentages developed.
3. Car repair costs and other costs related to car repair are added together to develop total car repair costs by type of cars which are used in summary 2, sheet 1, column (2) of this formula.

SUMMARY 2

Summary 2, Statistical and Repair Summary, develops per diem days payable per car, line-haul car-miles per car and average repair cost per car. These figures are used to compute costs-per-mile and costs-per-day by type of car.

1. *Computation of line-haul car-mile of time-mileage cars.*—Car-miles for each type of freight car will be taken from form OS-A shown as appendix B-22 in docket No. 36367 served August 2, 1976. The car types shown vary slightly from those proposed to be used in this formula and will be revised to conform to the car types ultimately decided upon for use in the car compensation formula.

In the absence of reporting car-miles by car types used in the formula, total car-miles reported in schedule 531, Statistics of Rail Line Operations would have to be allocated to car types based on a special study.

TABLE I

Adjustment of account 314, freight train car repairs, to determine percentages of expenses applicable to ownership costs and other expenses

	Total	Per diem freight train cars		Other expenses
		Ownership	User costs	
Total account 314, exhibit R-1, worktable 1, sheet 3, line 50	$488,898,352	$368,306,380	$46,489,983	$74,101,989
Less expense allocated to transportation—transfer from account 314 to account 402 (Accounting change—1971.)	17,866,546	----------	----------	17,866,546
Plus repacking journal boxes—transfer from account 402 to account 314—exhibit R-1, worktable 12, sheet 2, line 51 (Accounting change—1971.)	27,498,434	26,221,685	601,380	675,369
Less payment for foreign cars destroyed (charged to transportation—new system of accounts)	13,601,152	----------	13,601,152	----------
Adjusted total	484,929,088	394,528,065	33,490,211	56,910,812
Percent	100.000	81.358	6.906	11.736

2. *Computation of active per diem car-days and per diem days payable.*—The procedure used to develop active per diem car-days and per diem days payable is shown in worksheet 4. These car days are developed in the following manner:

a. The average number of cars owned and held under lease, as reported in the annual report, multiplied by the number of days in a year produces potential per diem car-days.

b. The average number of bad order cars, as published by the AAR in publication CS60-A, multiplied by the number of days in a year produces potential bad order car-days.

c. The average number of surplus cars, as published by the AAR in publication CS-44, multiplied by the number of days in a year produces potential surplus car-days.

d. Total per diem car-days minus bad order and surplus car-days produces total active per diem car-days.

e. Active per diem car-days, increased by the ratio of total foreign car-days to active foreign car-days, as described in footnote 11 of worksheet 4, produces per diem car-days payable. This statistic is used in developing the daily time charge.

Per diem days payable per car, line-haul car-miles per car, and average repair cost per car, for use in the rate table, have been based on 3-year moving averages for the latest 3 years available. This was done to absorb temporary fluctuations in economic conditions while reflecting longer term changes in utilization and costs.

Until the new system of accounts has been in effect for at least 3 years, the calculation of the items needed to compute car-hire rates by type of car cannot be computed using 3-year moving averages. In absence of this information, the first year would have to stand on its own, the second year a 2-year average should be used, and the third year, and thereafter, a 3-year moving average should be used.

The alternative is to disregard using any moving average and let each year stand on its own. Specific comment is requested on this subject.

SUMMARY 3

Summary 3, Summary of Investment Costs Per $1,000 Original Cost, has been designed in a format that is meant to be flexible. Because depreciation and age group probably will vary by car type what is shown in the proposed formula is based on a 3-percent depreciation rate and age groups in increments of 5 years. With the flexibility built into the table, different depreciation rates and age groups may be substituted.

1. The book value for interest and taxes in column (2) is computed as follows:

(a) Assume a 30-year life and a depreciation rate of 3 percent per year. (For illustrative purposes only; depreciation rate would vary based on service lives as determined).

(b) Also assume groups are in increments of 5 years.

(c) First age group (1st through 5th year) $1,000-$75=$925 average book value for the period. The $75 is the depreciation for 2 1/2 years.

(d) Second age group (6th through 10th year) $1,000=$225-$775 average book value for the period. The $225 is the depreciation for 7 1/2 years.

(e) Depreciation is calculated to the midpoint of the age group.

2. Annual depreciation is calculated by multiplying the rate of depreciation by $1,000. This annual depreciation is applicable to all age groups and is taken until the car is fully depreciated. These charges are shown in column (4).

3. The composite interest rate, which is applied to the book value of each group, produces the allowance for interest on value (cost of capital) and is developed by the method described in the discussion of "Current Cost of Capital."

4. The allowance for property taxes, also applied to the book value for each age group, is calculated by multiplying the book value by the tax ratio which is developed in footnote 1 to schedule 1.

5. The sum of depreciation, interest on value and allowance for property taxes for each age group is inserted in column (7) and is used in the rate table, summary 4.

SUMMARY 4

Summary 4, Car-Hire Rate Table, is used to calculate charges per line-haul mile by cost bracket, and daily time charges by cost bracket and age group. The rate table follows rate table C, ***Burlington*** case, ***supra*** at pages 242-243, with the exception of the cost brackets, which have been expanded. The age groups shown are the same as those used in summary 3. The cost brackets are the same as those currently used. The format of this summary can easily be changed to cover any number of cost brackets and age groups.

Mileage charges.—The rate table shows two sets of mileage charges, the first covers cars from 0-30 years and the last age group covers cars over 30 years.

Charges per line-haul mile are determined as follows:

1. Fifty percent of the annual repair and maintenance cost as shown in summary 2, column (8) is entered in column (3). This charge applies to all value blocks.

2. Add the annual reduction in car value (applicable to mileage) shown in column (2), to the annual repair and maintenance cost just calculated. This figure is entered in column (4) to give the total mileage cost.

3. The total mileage cost is then divided by the line-haul car-miles per car shown in summary 2, column (6) which provides the charges per line-haul mile for cars in each value bracket (cents per mile).

4. When cars are over 30 years old the charge per line-haul mile is determined by dividing 50 percent of the annual repair and maintenance cost by the line-haul car-miles per car. This figure will remain constant for all value blocks.

Time charges.—The daily time charge for cars in various age groups and value blocks is determined as follows:

1. Fifty percent of the annual repair and maintenance cost as shown in summary 2, column (8).

2. Add: the investment cost per $1,000 as shown in summary 3, column (7), by age group, multiplied by the midpoint of cost bracket (*e.g.* $1,000-3,000 is 2, $3,000-5,000 is 4, et cetera) for all brackets over $1,000.

3. Less: the annual reduction in value as shown in this summary, column (2).

4. This total annual time charge is then divided by the per diem days payable per car as shown in summary 2, column (4) to get a daily time charge (dollars per day).

5. The same procedure is used for cars over 30 years old except that the annual reduction in car value (depreciation) no longer applies.

An example of this procedure follows:

Assume:

(a) Fifty percent of the average repair cost per car is $500. (Summary 2, column (8).)

(b) Investment cost per $1,000 value (column (7) of summary 3) age group A is $150, and age group B is $120.

(c) Per diem days payable per car (column (4) summary 2) is 340 days.

Cars in group A, 0-5 years, value 0-$1,000:

Add:	
Repair cost	$555
Investment cost	150
	650
Less:	
Annual reduction in car value	12
Total annual cost	638
Daily charge = $638 ÷ 340 days	1.88

Cars in group A, 0-5 years, value 1-$3,000:

Add:	
Repair cost	$500
Investment cost $150 x 2 (middle of value block)	300
	800
Less:	
Annual reduction in car value	24
Total annual cost	776
Daily charge = $776 ÷ 340 days	2.28

Cars in group B, 6-10 years, value 0-$1,000:

Add:	
Repair cost	$500
Investment cost	120
	620
Less:	
Annual reduction in car value	12
Total annual cost	608
Daily charge + $608 ÷ 340 days	1.79

Cars in group B, 6-10 years, value 1-$3,000:

Add:	
Repair cost	$500
Investment cost $120 x 2	240
	740
Less:	
Annual reduction in car value	24
Total annual cost	716
Daily charge = $716 ÷ 340 days	2.11

By the Commission. (Commissioner Brown did not participate.)

(SEAL)

ROBERT L. OSWALD,
Secretary.

Appendixes A and B to the notice of proposed rulemaking are not reproduced.

APPENDIX II

I. *Railroad respondents*

Official name	Initial	Initial statement	Reply statement
1. Atchison, Topeka and Santa Fe Railway Company.	ATSF	x	x
2. Burlington Northern Inc., Missouri Pacific Railroad Company.	BN/MOPAC	x	x
3. Chicago & North Western Transportation Company.	CNW	x	x
4. Maine Central Railroad Company	MEC	x	
5. Norfolk and Western Railway Company	N&W	x	x
6. Southern Pacific Transportation Co. St. Louis Southern Railway Co. Northwestern Pacific Railroad Co.	SP	x	x
7. Southern Railway Company	SOU	x	
8. Soo Line Railroad Company	SOO	x	x
9. Western Pacific Railroad Company	WP	x	x
10. Joint submission of Atchison, Topeka and Santa Fe Railway Co. Burlington Northern, Inc. Denver and Rio Grande Western Railroad Co. Maine Central Railroad Co. Missouri Pacific Railroad Co. St. Louis-San Francisco Railway Co. St. Louis Southern Railway Co. Southern Pacific Transportation Co. Western Pacific Railroad Company	9-Road Group	x	

Official name	Initial	Initial statement	Reply statement
11. Joint submission of	19-Road Group	x	x
Baltimore & Ohio Railway Co.			
Bessemer & Lake Erie Railroad Co.			
Central Vermont Railway Co.			
Chesapeake & Ohio Railway Co.			
Chicago, Milwaukee, St. Paul & Pacific Railroad.			
Chicago, Rock Island & Pacific Railroad Co.			
Consolidated Rail Corporation			
Duluth, Missabe and Iron Range Railway Co.			
Duluth, Winnipeg & Pacific Railway			
Elgin, Joliet and Eastern Railway Co.			
Grand Trunk Western Railroad Co.			
Illinois Central Gulf Railroad Co.			
Long Island Railroad			
Louisville & Nashville Railroad Co.			
Pittsburgh & Lake Erie Railroad			
Seaboard Coast Line Railroad			
Southern Railway Co.			
Union Pacific Railroad			
Western Maryland Railway Co.			
12. Chicago Rock Island & Pacific	CRIP		x
13. Joint reply of respondent railroads on private car issue.	31-Road Group		x
The Atchison, Topeka and Santa Fe Railway Company.			
Baltimore & Ohio Railroad Co.			
Bessemer & Lake Erie Railroad Co.			
Burlington Northern, Inc.			
Central Vermont Railway, Inc.			
The Chesapeake & Ohio Railway Co.			
Chicago, Milwaukee, St. Paul & Pacific Railroad.			
Chicago, Rock Island & Pacific Railroad Co.			
Consolidated Rail Corporation			
Denver and Rio Grande Western Railroad Company.			
Duluth, Missabe and Iron Range Railway Co.			
Duluth, Winnipeg & Pacific Railway			
Elgin, Joliet and Eastern Railway Co.			
Grand Trunk Western Railroad Co.			
Illinois Central Gulf Railroad Co.			
The Long Island Railroad			
Louisville and Nashville Railroad Co.			
Maine Central Railroad Company			
Missouiri Pacific Railroad Co.			
Norfolk and Western Railway Co.			
Pittsburgh & Lake Erie Railroad			
Seaboard Coast Line Railroad			
Soo Line Railroad Co.			

Official name	Initial	Initial statement	Reply statement
Southern Pacific Transportation Co.			
Southern Railway Co.			
St. Louis-San Francisco Railway Co.			
St. Louis Southwestern Railway Co.			
Union Pacific Railroad			
Western Maryland Railway Co.			
Western Pacific Railroad Co.			
Detroit, Toledo and Ironton Railroad Co.			
II. *Shipper and private car respondents*			
1. Allied Chemical Corporation	Allied	x	x
2. American Iron and Steel Institute		x	
3. American Paper Institute		x	x
4. Archer Daniels Midland Company	Archer Daniels	x	x
5. Carnation Company		x	x
6. Construction Aggregate Rail Shippers Conference, Inc.	CARS	x	
7. Continental Grain Company		x	
8. David I. Joseph Company		x	
9. E.I. Du Pont De Nemours and Company		x	
10. Farmland Industries		x	
11. Fruit Growers Express Company	FGE	x	x
12. Georgia-Pacific Corporation	Georgia-Pacific	x	
13. General Foods Corporation	General Foods	x	x
14. General Mills, Inc	General Mills	x	x
15. Grain Processing Corporation		x	
16. Institute of Scrap Iron & Steel, Inc		x	
17. LO Shippers Action Committee	LOSAC	x	x
18. Louisiana-Pacific Corporation		x	
19. Manufacturing Chemists Association, Inc	MCA	x	x
20. National Industrial Traffic League	NITL	x	x
21. Penwick & Ford Limited		x	
22. Pillsbury Company		x	x
23. Pullman Leasing Company		x	
24. Quaker Oats Company		x	x
25. Shippers Equitable Compensation Action Committee.	SECAC	x	x
26. Tennessee Eastman Company	Tennessee Eastman.	x	
27. United States Railway Equipment Company.	USRE	x	x
28. Joint statement of		x	
Trailer Train Company	Trailer Train		
American Rail Box Car Co.	Railbox		
29. Joint statement of		x	
General American Transportation Corporation.			
North American Car Corporation			
Shipper Car Line Division of ACF Industries, Inc.			
Union Tank Car Company			
30. Louis Dreyfus Corporation			x
31. SSI Rail Corporation	SSI		x

APPENDIX III

RAIL FORM H 8-76

FORMULA FOR USE IN DETERMINING THE RATE OF COMPENSATION (TIME AND MILEAGE) TO BE PAID FOR THE USE OF FREIGHT TRAIN CARS BY TYPE OF CAR

BASED ON EXPENSES AND STATISTICS FOR THE YEAR 19———

EX PARTE NO. 334

PREPARED BY THE SECTION OF COST AND VALUATION OF THE BUREAU OF ACCOUNTS

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EXPLANATORY STATEMENT

PURPOSE

The Section of Cost and Valuation of the Bureau of Accounts has developed a formula for the purpose of calculating the rates of compensation to be paid for the use of others' freight-train cars, time and mileage. The formula is designed to determine rates of compensation for various types of freight-train cars. This is in accordance with Section 212, subsection (a) of the Railroad Revitalization and Regulatory Reform Act of 1976.

SOURCE OF EXPENSES AND STATISTICS

In certain sections of the formula, source references are made to accounts or items in the annual reports of the railroads. It is the intent of the formula that expenses and other data may be take from the appropriate sections of Transport Statistics in the United States for the particular year under study. Certain statistics are taken from sources other than the annual reports or Transport Statistics, such as Interstate Commerce Commission Statement No. 100, Financial and Operating Statistics, Class I Railroads, publications of the Association of American Railroads, Car Service Division, Statement CS-60A, Revenue Freight Cars in Unserviceable Condition, Class I Railroads and Statement CS-44-C, Average Daily Freight Car Surpluses and Shortages.

SUMMARY 1

The purpose of Summary 1 is to distribute car repair ownership costs by type of freight-train car.

SUMMARY 2

The purpose of Summary 2 (Statistical and Repair Summary) is to calculate per diem days payable per car, line-haul car-miles per car, and average repair cost per car by type of freight-train car.

SUMMARY 3

The purpose of Summary 3 (Computation of 3-Year Averages for Use in Rate Tables) is to compute averages for car repair expenses, per diem days payable and line-haul miles per car.

SUMMARY 4

The purpose of Summary 4 (Summary of Investment Costs per $1,000 Original Cost) is to calculate depreciation charges, interest on value and allowance for property taxes for use in the Car Hire Rate Table (Summary 6), for each type of freight-train car.

SUMMARY 5

The purpose of Summary 5 (Car Hire Rate Table-Mileage Rates) is to calculate charges per line-haul mile by cost bracket and age for each type of freight-train car.

SUMMARY 6

The purpose of Summary 6 (Car Hire Rate Table - Daily Rates) is to calculate daily time charges by cost bracket and age group for each type of freight-train car.

SCHEDULE 1

The purpose of Schedule 1, sheets 1 and 2, is to accumulate freight expenses and distribute them between ownership costs, other expenses, and general overhead.

WORKSHEET 1

The purpose of Worksheet 1 is to compute percentages for use in future applications of Rail Form H to apportion Way and Structures Expenses (excluding depreciation), Way and Structures-Depreciation, Equipment Expenses-Other than Freight-train cars (excluding depreciation), Equipment-Other than Freight-train cars-Depreciation, and General and Administrative Expenses between ownership costs, other expenses and general overhead in Schedule 1.

WORKSHEET 2

The purpose of Worksheet 2 is to compute percentages for use in future applications of Rail Form H to apportion Transportation Expenses between ownership costs, other expenses and general overhead in Schedule 1.

WORKSHEET 3

The purpose of Worksheet 3 is to compute a percentage for use in future applications of Rail Form H to exclude expenses which are not applicable to non-revenue freight in the calculation of the cost of handling non-revenue freight applicable to the repair of equipment in Footnote 7 to Schedule 1.

WORKSHEET 4

The purpose of Worksheet 4 is to compute per diem days payable by type of freight-train car. These are converted to per diem days payable per car for use in computing daily time charges in Summary 6.

WORKSHEET 5

The purpose of Worksheet 5 (Formula for Calculating Cost of Capital and Cost of Capital Rates for Use in Summary 4) is to (1) show the method used to develop cost of capital percentages and (2) provide cost of capital rates for use in Summary 4 (Summary of Investment Costs per $1,000 Original Cost).

Distribution of Car Repair Ownership Costs by Type of Freight-Train Car (Dollar Amounts in Thousands)

Summary 1
Sheet 1 of 1

Line No.	Type of Car (1)	Total Car Repair Ownership Cost 1/ (2)	Percent of Total 2/ (3)	Other Costs Related to Car Repair 3/ (4)	Total Car Repair Costs 4/ (5)	Line No.
1	Box-Plain 40 Foot	$		$	$	1
2	Box-Plain 50 Foot and Longer					2
3	Box-Equipped					3
4	Gondola-Plain					4
5	Gondola-Equipped					5
6	Hopper-Covered					6
7	Hopper-Open Top-General Service					7
8	Hopper-Open Top-Special Service					8
9	Refrigerator-Mechanical					9
10	Refrigerator-Non-Mechanical					10
11	Flat-TOFC/COFC					11
12	Flat-Multi-Level					12
13	Flat-General Service					13
14	Flat-Other					14
15	All Other Cars					15
16	Total	$	100.000%	$ 3/	$	16

1/ Schedule 1, sheet 2, lines 37 through 52, col. (6).
2/ Lines 1 through 15, col. (2) divided by line 16, col. (2).
3/ Schedule 1, sheet 1 and 2, col. (6), sum of lines 9, 14, 15, 20, 22, 23, 26, 28, 31, and 33, insert in line 16, col. (4), & multiply line 16 by each percentage on lines 1 through 15, col. (3).
4/ Col. (2) plus col. (4), lines 1 through 16.

Statistical and Repair Summary (Dollar Amounts in Thousands)

Summary 2
Sheet 1 of 1

Line No.	Type of Car (1)	Total Ownership Expense 1/ (2)	Total Per Diem Days Payable 2/ (3)	Per Diem Days Payable Per Car 3/ (4)	Total Line-haul Car Miles 4/ (5)	Line-Haul Car Miles Per Car 5/ (6)	Total Freight Cars Owned & Leased 6/ (7)	Average Repair Cost Per Car 7/ (8)	Line No.
1	Box-Plain 40 Foot	$						$	1
2	Box-Plain 50 Foot and Longer								2
3	Box-Equipped								3
4	Gondola-Plain								4
5	Gondola-Equipped								5
6	Hopper-Covered								6
7	Hopper-Open Top-General Service								7
8	Hopper-Open Top-Special Service								8
9	Refrigerator-Mechanical								9
10	Refrigerator-Non-Mechanical								10
11	Flat-TOFC/COFC								11
12	Flat-Multi-Level								12
13	Flat-General Service								13
14	Flat-Other								14
15	All Other Cars								15
16	Total	$						$	16

1/ Summary 1, Lines 1 through 16, col. (5).
2/ Work sheet 4, Lines 1 through 16, col. (11).
3/ Col. (3) divided by col. (7).
4/ Form OS-A, Train and Yard Service, Lines 39 through 56 and 58 through 75. (Sum of empty and loaded for each type.) Note: Tank cars are to be included in all other car types.
5/ Col. (5) divided by col. (7).
6/ Work sheet 4, Line 1 through 16, col. (4).
7/ Col. (2) divided by col. (7).

Computation of Three Year Averages For Use in Car Hire Rate Tables
Type of Car ______________

Summary 3

Line No.	Item (1)	Source (2)	Year 19__ (3)	 19__ (4)	 19__ (5)	Three Year Average (6)	Line No.
1	Repair Cost per car	Summary 2, Col. (8) for each type	$	$	$	$	1
2	Portion of Repair Cost applicable to labor	Line 1 x 50%	XXX	XXX	XXX		2
3	Portion of Repair cost applicable to material	Line 1 x 50%	XXX	XXX	XXX		3
4	Labor Index	AAR Series Q-MPW, Wage Rates and Supplements					4
5	Material Index	AAR Series Q-MPW, Other Materials & Supplies					5
6	Current Period Labor Index (DATE)________	AAR Spot Wage Indices, Wage Rates & Supplements	XXX	XXX	XXX		6
7	Current Period Material Index (DATE)________	AAR Series Q-MPW, Material, excluding fuel	XXX	XXX	XXX		7
8	Ratio of Current Period Labor Index to Average Labor Index	Line 6, Col. (6) ÷ Line 4, Col. (6)	XXX	XXX	XXX		8
9	Ratio of Current Period Material Index to Average Material Index	Line 7, Col. (6) ÷ Line 5, Col. (6)	XXX	XXX	XXX		9
10	Indexed Labor Expense	Line 2, Col. (6) x Line 8, Col. (6)	XXX	XXX	XXX	$	10
11	Indexed Material Expense	Line 3, Col. (6) x Line 9, Col. (6)	XXX	XXX	XXX	$	11
12	Total Indexed Repair Cost Per Car	Line 10, Col. (6) plus Line 11, Col. (6)	XXX	XXX	XXX	$	12
13	Mileage Portion	Line 12 x 50 Percent	XXX	XXX	XXX	$	13
14	Time Portion	Line 12 x 50 Percent	XXX	XXX	XXX	$	14
15	Line-Haul Car Miles Per Car	Summary 2, Col. (6) for each car type					15
16	Per Diem Days Payable Per Car	Summary 2, Col. (4) for each car type					16

1/ Sum of Columns (3), (4), and (5) divided by 3.

Summary of Investment Costs per $1,000 Original Cost

Summary 4

Plain Box - 40 Foot

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value		Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
			Percent 2/ (4)	Amount 3/ (5)			
0-1	$983.75	$32.50		$	$	$	0-1
1-2	951.25	32.50					1-2
2-3	918.75	32.50					2-3
3-4	886.25	32.50					3-4
4-5	853.75	32.50					4-5
5-6	821.25	32.50					5-6
6-7	788.75	32.50					6-7
7-8	756.25	32.50					7-8
8-9	723.75	32.50					8-9
9-10	691.25	32.50					9-10
10-11	658.75	32.50					10-11
11-12	626.25	32.50					11-12
12-13	593.75	32.50					12-13
13-14	561.25	32.50					13-14
14-15	528.75	32.50					14-15
15-16	496.25	32.50					15-16
16-17	463.75	32.50					16-17
17-18	431.25	32.50					17-18
18-19	398.75	32.50					18-19
19-20	366.25	32.50					19-20
20-21	333.75	32.50					20-21
21-22	301.25	32.50					21-22
22-23	268.75	32.50					22-23
23-24	236.25	32.50					23-24
Over 24	$220.00	$ -0-		$	$	$	Over 24

Plain Box - 50 Feet and Longer

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value		Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
			Percent 2/ (4)	Amount 3/ (5)			
0-1	$983.80	$32.40		$	$	$	0-1
1-2	951.40	32.40					1-2
2-3	919.00	32.40					2-3
3-4	886.60	32.40					3-4
4-5	854.20	32.40					4-5
5-6	821.80	32.40					5-6
6-7	789.40	32.40					6-7
7-8	757.00	32.40					7-8
8-9	724.60	32.40					8-9
9-10	692.20	32.40					9-10
10-11	659.80	32.40					10-11
11-12	627.40	32.40					11-12
12-13	595.00	32.40					12-13
13-14	562.60	32.40					13-14
14-15	530.20	32.40					14-15
15-16	497.80	32.40					15-16
16-17	465.40	32.40					16-17
17-18	433.00	32.40					17-18
18-19	400.60	32.40					18-19
19-20	368.20	32.40					19-20
20-21	335.80	32.40					20-21
21-22	303.40	32.40					21-22
22-23	271.00	32.40					22-23
23-24	238.60	32.40					23-24
24-25	206.20	32.40		$	$	$	24-45
Over 25	$190.00	$ -0-					Over 25

Equipped Box

0-1	$984.05	$31.90		$	$	$	0-1
1-2	952.15	31.90					1-2
2-3	920.25	31.90					2-3
3-4	888.35	31.90					3-4
4-5	856.45	31.90					4-5
5-6	824.55	31.90					5-6
6-7	792.65	31.90					6-7
7-8	760.75	31.90					7-8
8-9	728.85	31.90					8-9
9-10	696.95	31.90					9-10
10-11	665.05	31.90					10-11
11-12	633.15	31.90					11-12
12-13	601.25	31.90					12-13
13-14	569.35	31.90					13-14
14-15	537.45	31.90					14-15
15-16	505.55	31.90					15-16
16-17	473.65	31.90					16-17
17-18	441.75	31.90					17-18
18-19	409.85	31.90					18-19
19-20	377.95	31.90					19-20
20-21	346.05	31.90					20-21
21-22	314.15	31.90					21-22
22-23	282.25	31.90					22-23
23-24	250.35	31.90					23-24
24-25	218.45	31.90					24-25
25-26	186.55	31.90					25-26
Over 26	$170.00	$ -0-		$	$	$	Over 26

Plain Gondola

0-1	$985.55	$28.90		$	$	$	0-1
1-2	956.65	28.90					1-2
2-3	927.75	28.90					2-3
3-4	898.85	28.90					3-4
4-5	869.95	28.90					4-5
5-6	841.05	28.90					5-6
6-7	812.15	28.90					6-7
7-8	783.25	28.90					7-8
8-9	754.35	28.90					8-9
9-10	725.45	28.90					9-10
10-11	696.55	28.90					10-11
11-12	667.65	28.90					11-12
12-13	638.75	28.90					12-13
13-14	609.85	28.90					13-14
14-15	580.95	28.90					14-15
15-16	552.05	28.90					15-16
16-17	523.15	28.90					16-17
17-18	494.25	28.90					17-18
18-19	465.35	28.90					18-19
19-20	436.45	28.90					19-20
20-21	407.55	28.90					20-21
21-22	378.65	28.90					21-22
22-23	349.75	28.90					22-23
23-24	320.85	28.90					23-24
24-25	291.95	28.90					24-25
25-26	263.05	28.90					25-26
26-27	234.15	28.90					26-27
Over 27	$220.00	$ -0-		$	$	$	Over 27

Summary of Investment Costs per $1,000 Original Cost

Summary 4

Equipped Gondolas

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value: Percent 2/ (4)	Composite Interest on Value: Amount 3/ (5)	Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
0-1	$987.35	$25.30		$	$	$	0-1
1-2	962.05	25.30					1-2
2-3	936.75	25.30					2-3
3-4	911.45	25.30					3-4
4-5	886.15	25.30					4-5
5-6	860.85	25.30					5-6
6-7	835.55	25.30					6-7
7-8	810.25	25.30					7-8
8-9	784.95	25.30					8-9
9-10	759.65	25.30					9-10
10-11	734.35	25.30					10-11
11-12	709.05	25.30					11-12
12-13	683.75	25.30					12-13
13-14	658.45	25.30					13-14
14-15	633.15	25.30					14-15
15-16	607.85	25.30					15-16
16-17	582.55	25.30					16-17
17-18	557.25	25.30					17-18
18-19	531.95	25.30					18-19
19-20	506.65	25.30					19-20
20-21	481.35	25.30					20-21
21-22	456.05	25.30					21-22
22-23	430.75	25.30					22-23
23-24	405.45	25.30					23-24
24-25	380.15	25.30					24-25
25-26	354.85	25.30					25-26
26-27	329.55	25.30					26-27
27-28	304.25	25.30					27-28
28-29	278.95	25.30					28-29
29-30	253.65	25.30					29-30
30-31	228.35	25.30					30-31
31-32	203.05	25.30					31-32
32-33	177.75	25.30					32-33
33-34	152.45	25.30					33-34
Over 34	[illegible]	$ -0-		$	$	$	Over 34

Covered Hoppers

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value: Percent 2/ (4)	Composite Interest on Value: Amount 3/ (5)	Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
0-1	$985.70	$28.60		$	$	$	0-1
1-2	957.10	28.60					1-2
2-3	928.50	28.60					2-3
3-4	899.90	28.60					3-4
4-5	871.30	28.60					4-5
5-6	842.70	28.60					5-6
6-7	814.10	28.60					6-7
7-8	785.50	28.60					7-8
8-9	756.90	28.60					8-9
9-10	728.30	28.60					9-10
10-11	699.70	28.60					10-11
11-12	671.10	28.60					11-12
12-13	642.50	28.60					12-13
13-14	613.90	28.60					13-14
14-15	585.30	28.60					14-15
15-16	556.70	28.60					15-16
16-17	528.10	28.60					16-17
17-18	499.50	28.60					17-18
18-19	470.90	28.60					18-19
19-20	442.30	28.60					19-20
20-21	413.70	28.60					20-21
21-22	385.10	28.60					21-22
22-23	356.50	28.60					22-23
23-24	327.90	28.60					23-24
24-25	299.30	28.60					24-25
25-26	270.70	28.60					25-26
26-27	242.10	28.60					26-27
27-28	213.50	28.60					27-28
28-29	184.90	28.60					28-29
Over 29	$170.00	$ -0-		$	$	$	Over 29

Open Top Hopper - General Service

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value: Percent 2/ (4)	Composite Interest on Value: Amount 3/ (5)	Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
0-1	$983.25	$33.50		$	$	$	0-1
1-2	949.75	33.50					1-2
2-3	916.25	33.50					2-3
3-4	882.75	33.50					3-4
4-5	849.25	33.50					4-5
5-6	815.75	33.50					5-6
6-7	782.25	33.50					6-7
7-8	748.75	33.50					7-8
8-9	715.25	33.50					8-9
9-10	681.75	33.50					9-10
10-11	648.25	33.50					10-11
11-12	614.75	33.50					11-12
12-13	581.25	33.50					12-13
13-14	547.75	33.50					13-14
14-15	514.25	33.50					14-15
15-16	480.75	33.50					15-16
16-17	447.25	33.50					16-17
17-18	413.75	33.50					17-18
18-19	380.25	33.50					18-19
19-20	346.75	33.50					19-20
20-21	313.25	33.50					20-21
21-22	279.75	33.50					21-22
22-23	246.25	33.50					22-23
Over 23	$230.00	$ -0-		$	$	$	Over 23

Summary of Investment Costs per $1,000 Original Cost

Summary 4

Open Top Hopper - Special Service

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value: Percent 2/ (4)	Composite Interest on Value: Amount 3/ (5)	Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
0-1	$989.85	$20.30		$	$	$	0-1
1-2	969.55	20.30					1-2
2-3	949.25	20.30					2-3
3-4	928.95	20.30					3-4
4-5	908.65	20.30					4-5
5-6	888.35	20.30					5-6
6-7	868.05	20.30					6-7
7-8	847.75	20.30					7-8
8-9	827.45	20.30					8-9
9-10	807.15	20.30					9-10
10-11	786.85	20.30					10-11
11-12	766.55	20.30					11-12
12-13	746.25	20.30					12-13
13-14	725.95	20.30					13-14
14-15	705.65	20.30					14-15
15-16	685.35	20.30					15-16
16-17	665.05	20.30					16-17
17-18	644.75	20.30					17-18
18-19	624.45	20.30					18-19
19-20	604.15	20.30					19-20
20-21	583.85	20.30					20-21
21-22	563.55	20.30					21-22
22-23	543.25	20.30					22-23
23-24	522.95	20.30					23-24
24-25	502.65	20.30					24-25
25-26	482.35	20.30					25-26
26-27	462.05	20.30					26-27
27-28	441.75	20.30					27-28
28-29	421.45	20.30					28-29
29-30	401.15	20.30					30-31
30-31	380.85	20.30					31-32
31-32	360.55	20.30					31-32
32-33	340.25	20.30					32-33
33-34	319.95	20.30					33-34
34-35	299.65	20.30					34-35
35-36	279.35	20.30					35-36
36-37	259.05	20.30					36-37
37-38	238.75	20.30					37-38
Over 38	$230.00	$ -0-	$	$	$	$	Over 38

Refrigerator - Non-Mechanical

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value: Percent 2/ (4)	Composite Interest on Value: Amount 3/ (5)	Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
0-1	$982.20	$35.60		$	$	$	0-1
1-2	946.60	35.60					1-2
2-3	911.00	35.60					2-3
3-4	875.40	35.60					3-4
4-5	839.80	35.60					4-5
5-6	804.20	35.60					5-6
6-7	768.60	35.60					6-7
7-8	733.00	35.60					7-8
8-9	697.40	35.60					8-9
9-10	661.80	35.60					9-10
10-11	626.20	35.60					10-11
11-12	590.60	35.60					11-12
12-13	555.00	35.60					12-13
13-14	519.40	35.60					13-14
14-15	483.80	35.60					14-15
15-16	448.20	35.60					15-16
16-17	412.60	35.60					16-17
17-18	377.00	35.60					17-18
18-19	341.40	35.60					18-19
19-20	305.80	35.60					19-20
20-21	270.20	35.60					20-21
21-22	234.60	35.60					21-22
22-23	199.00	35.60					22-23
23-24	163.40	35.60					23-24
24-25	127.80	35.60					24-25
Over 25	$110.00	$ -0-		$		$	Over 25

Refrigerator - Mechanical

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value: Percent 2/ (4)	Composite Interest on Value: Amount 3/ (5)	Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
0-1	$983.10	33.80		$		$	0-1
1-2	949.30	33.80					1-2
2-3	915.50	33.80					2-3
3-4	881.70	33.80					3-4
4-5	847.90	33.80					4-5
5-6	814.10	33.80					5-6
6-7	780.30	33.80					6-7
7-8	746.50	33.80					7-8
8-9	712.70	33.80					8-9
9-10	678.90	33.80					9-10
10-11	645.10	33.80					10-11
11-12	611.30	33.80					11-12
12-13	577.50	33.80					12-13
13-14	543.70	33.80					13-14
14-15	509.90	33.80					14-15
15-16	476.10	33.80					15-16
16-17	442.30	33.80					16-17
17-19	408.50	33.80					17-18
18-19	374.70	33.80					18-19
19-20	340.90	33.80					19-20
20-21	307.10	33.80					20-21
21-22	273.30	33.80					21-22
22-23	239.50	33.80					22-23
23-24	205.70	33.80					23-24
24-25	171.90	33.80					24-25
25-26	138.10	33.80					25-26
Over 26	$120.00	$ -0-		$	$	$	Over 26

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Summary of Investment Costs per $1,000 Original Cost

Summary 4

Flat Cars - TOFC/COFC

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value: Percent 2/ (4)	Composite Interest on Value: Amount 3/ (5)	Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
0-1	$985.85	$28.30		$	$	$	0-1
1-2	957.55	28.30					1-2
2-3	929.25	28.30					2-3
3-4	900.95	28.30					3-4
4-5	872.65	28.30					4-5
5-6	844.35	28.30					5-6
6-7	816.05	28.30					6-7
7-8	787.75	28.30					7-8
8-9	759.45	28.30					8-9
9-10	731.15	28.30					9-10
10-11	702.85	28.30					10-11
11-12	674.55	28.30					11-12
12-13	646.25	28.30					12-13
13-14	617.95	28.30					13-14
14-15	589.65	28.30					14-15
15-16	561.35	28.30					15-16
16-17	533.05	28.30					16-17
17-18	504.75	28.30					17-18
18-19	476.45	28.30					18-19
19-20	448.15	28.30					19-20
20-21	419.85	28.30					20-21
21-22	391.55	28.30					21-22
22-23	363.25	28.30					22-23
23-24	334.95	28.30					23-24
24-25	306.65	28.30					24-25
25-26	278.35	28.30					25-26
26-27	250.05	28.30					26-27
27-28	221.75	28.30					27-28
28-29	193.45	28.30					28-29
Over 29	$180.00	$ -0-		$	$	$	Over 29

Flat Cars - Multi-Level

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value: Percent 2/ (4)	Composite Interest on Value: Amount 3/ (5)	Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
0-1	$982.20	$35.60		$	$	$	0-1
1-2	946.60	35.60					1-2
2-3	911.00	35.60					2-3
3-4	875.40	35.60					3-4
4-5	839.80	35.60					4-5
5-6	804.20	35.60					5-6
6-7	768.60	35.60					6-7
7-8	733.00	35.60					7-8
8-9	697.40	35.60					8-9
9-10	661.80	35.60					9-10
10-11	626.20	35.60					10-11
11-12	590.60	35.60					11-12
12-13	555.00	35.60					12-13
13-14	519.40	35.60					13-14
14-15	483.80	35.60					14-15
15-16	448.20	35.60					15-16
16-17	412.60	35.60					16-17
17-18	377.00	35.60					17-18
18-19	341.40	35.60					18-19
19-20	305.80	35.60					19-20
20-21	270.20	35.60					20-21
21-22	234.60	35.60					21-22
22-23	199.00	35.60					22-23
23-24	163.40	35.60					23-24
24-25	127.80	35.60					24-25
Over 25	$110.00	$ -0-		$	$	$	Over 25

Flat Cars - General Service

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value: Percent 2/ (4)	Composite Interest on Value: Amount 3/ (5)	Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
0-1	$988.20	$23.60		$	$	$	0-1
1-2	964.60	23.60					1-2
2-3	941.00	23.60					2-3
3-4	917.40	23.60					3-4
4-5	893.80	23.60					4-5
5-6	870.20	23.60					5-6
6-7	846.60	23.60					6-7
7-8	823.00	23.60					7-8
8-9	799.40	23.60					8-9
9-10	775.80	23.60					9-10
10-11	752.20	23.60					10-11
11-12	728.60	23.60					11-12
12-13	705.00	23.60					12-13
13-14	681.40	23.60					13-14
14-15	657.80	23.60					14-15
15-16	634.20	23.60					15-16
16-17	610.60	23.60					16-17
17-18	587.00	23.60					17-18
18-19	563.40	23.60					18-19
19-20	539.80	23.60					19-20
20-21	516.20	23.60					20-21
21-22	492.60	23.60					21-22
22-23	469.00	23.60					22-23
23-24	445.40	23.60					23-24
24-25	421.80	23.60					24-25
25-26	398.20	23.60					25-26
26-27	374.60	23.60					26-27
27-28	351.00	23.60					27-28
28-29	327.40	23.60					28-29
29-30	303.80	23.60					29-30
30-31	280.20	23.60					30-31
31-32	256.60	23.60					31-32
32-33	233.00	23.60					32-33
Over 33	$220.00	$ -0-		$	$	$	Over 33

Summary of Investment Costs per $1,000 Original Cost

Summary 4

Flat Cars - Other

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value: Percent 2/ (4)	Composite Interest on Value: Amount 3/ (5)	Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
0-1	$988.90	$22.20		$	$	$	0-1
1-2	966.70	22.20					1-2
2-3	944.50	22.20					2-3
3-4	922.30	22.20					3-4
4-5	900.10	22.20					4-5
5-6	877.90	22.20					5-6
6-7	855.70	22.20					6-7
7-8	833.50	22.20					7-8
8-9	811.30	22.20					8-9
9-10	789.10	22.20					9-10
10-11	766.90	22.20					10-11
11-12	744.70	22.20					11-12
12-13	722.50	22.20					12-13
13-14	700.30	22.20					13-14
14-15	678.10	22.20					14-15
15-16	655.90	22.20					15-16
16-17	633.70	22.20					16-17
17-18	611.50	22.20					17-18
18-19	589.30	22.20					18-19
19-20	567.10	22.20					19-20
20-21	544.90	22.20					20-21
21-22	522.70	22.20					21-22
22-23	500.50	22.20					22-23
23-24	478.30	22.20					23-24
24-25	456.10	22.20					24-25
25-26	433.90	22.20					25-26
26-27	411.70	22.20					26-27
27-28	389.50	22.20					27-28
28-29	367.30	22.20					28-29
29-30	345.10	22.20					29-30
30-31	322.90	22.20					30-31
31-32	300.70	22.20					31-32
32-33	278.50	22.20					32-33
33-34	256.30	22.20					33-34
34-35	234.10	22.20					34-35
35-36	211.90	22.20					35-36
36-37	189.70	22.20					36-37
Over 37	$180.00	$ -0-		$	$	$	Over 37

All Other Freight Cars

Years in Service (1)	Book Value For Interest and Taxes 1/ (2)	Annual Depre. (3)	Composite Interest on Value: Percent 2/ (4)	Composite Interest on Value: Amount 3/ (5)	Allowance for Property Taxes 4/ (6)	Total of Cols. 3, 5, & 6 (7)	Years in Service (8)
0-1	$986.15	$27.70		$	$	$	0-1
1-2	958.45	27.70					1-2
2-3	930.75	27.70					2-3
3-4	903.05	27.70					3-4
4-5	875.35	27.70					4-5
5-6	847.65	27.70					5-6
6-7	819.95	27.70					6-7
7-8	792.25	27.70					7-8
8-9	764.55	27.70					8-9
9-10	736.85	27.70					9-10
10-11	709.15	27.70					10-11
11-12	681.45	27.70					11-12
12-13	653.75	27.70					12-13
13-14	626.05	27.70					13-14
14-15	598.35	27.70					14-15
15-16	570.65	27.70					15-16
16-17	542.95	27.70					16-17
17-18	515.25	27.70					17-18
18-19	487.55	27.70					18-19
19-20	459.85	27.70					19-20
20-21	432.15	27.70					20-21
21-22	404.45	27.70					21-22
22-23	376.75	27.70					22-23
23-24	349.05	27.20					23-24
24-25	321.35	27.70					24-25
25-26	293.65	27.70					25-26
26-27	265.95	27.70					26-27
27-28	238.25	27.70					27-28
28-29	210.55	27.70					28-29
29-30	182.85	27.70					29-30
Over 30	$170.00	$ -0-		$	$	$	Over 30

1/ $1000 original cost less Depreciation calculated at the mid-point of the age bracket.

2/ Cost of Capital (Percent) from Worksheet 3.

3/ Column (2) multiplied by column (4).

4/ Column (2) multiplied by ratio in footnote 2 to schedule 1, line 5, column (3).

Car Hire Rate Table - Mileage Rates
(Cents Per Mile)

Summary 5

Line No.	Value Bracket (1)	Box-Plain 40 Feet					Box-Plain 50 Feet and Longer					Box-Equipped					Line No.
		Annual Reduction In Value 1/ (2)	Annual Repair and Maintenance 2/ (3)	Total Mileage Cost 3/ (4)	Charge Per Line-Haul Mile 0-24 Yrs. 4/ (5)	Charge Per Line-Haul Mile Over 24 Yrs. 3/ (6)	Annual Reduction In Value 1/ (7)	Annual Repair and Maintenance 2/ (8)	Total Mileage Cost 3/ (9)	Charge Per Line-Haul Mile 0- 25 Yrs. 4/ (10)	Charge-Per Line-Haul Mile Over 25 Yrs. 3/ (11)	Annual Reduction In Value 1/ (12)	Annual Repair and Maintenance 2/ (13)	Total Mileage Cost 3/ (14)	Charge-Per Line-Haul Mile 0- 26 Yrs. 4/ (15)	Charge Per Line-Haul Mile Over 26 Yrs. 3/ (16)	
1	$0- 1,000	$ 6.50	$	$	¢	¢	$ 6.48	$	$	¢	¢	$ 6.38	$	$	¢	¢	1
2	1- 2,000	19.50					19.44					19.14					2
3	2- 3,000	32.50					32.40					31.90					3
4	3- 4,000	45.50					45.36					44.66					4
5	4- 5,000	58.50					58.32					57.42					5
6	5- 6,000	71.50					71.28					70.18					6
7	6- 7,000	84.50					84.24					82.94					7
8	7- 8,000	97.50					97.20					95.70					8
9	8- 9,000	110.50					110.16					108.46					9
10	9-10,000	123.50					123.12					121.22					10
11	10-11,000	136.50					136.08					133.98					11
12	11-12,000	149.50					149.04					146.74					12
13	12-13,000	162.50					162.00					159.50					13
14	13-14,000	175.50					174.96					172.26					14
15	14-15,000	188.50					187.92					185.02					15
16	15-16,000	201.50					200.88					197.78					16
17	16-17,000	214.50					213.84					210.54					17
18	17-18,000	227.50					226.80					223.30					18
19	18-19,000	240.50					239.76					236.06					19
20	19-20,000	253.50					252.72					248.82					20
21	20-21,000	266.50					265.68					261.58					21
22	21-22,000	279.50					278.64					274.34					22
23	22-23,000	292.50					291.60					287.10					23
24	23-24,000	305.50					304.56					299.86					24
25	24-25,000	318.50					317.52					312.62					25
26	25-26,000	331.50					330.48					325.38					26
27	26-27,000	344.50					343.44					338.14					27
28	27-28,000	357.50					356.40					350.90					28
29	28-29,000	370.50					369.36					363.66					29
30	29-30,000	383.50					382.32					376.42					30
31	30-31,000	396.50					395.28					389.18					31
32	31-32,000	409.50					408.24					401.94					32
33	32-33,000	422.50					421.20					414.70					33
34	33-34,000	435.50					434.16					427.46					34
35	34-35,000	448.50					447.12					440.22					35
36	35-36,000	461.50					460.08					452.98					36
37	36-37,000	474.50					473.04					465.74					37
38	37-38,000	487.50					486.00					478.50					38
39	38-39,000	500.50					498.96					491.26					39
40	39-40,000	513.50					511.92					504.02					40
41	40-41,000	526.50					524.88					516.78					41
42	41-42,000	539.50					537.84					529.54					42
43	42-43,000	552.50					550.80					542.30					43
44	43-44,000	565.50					563.76					555.06					44
45	44-45,000	578.50					576.72					567.82					45
46	45-46,000	591.50					589.68					580.58					46
47	46-47,000	604.50					602.64					593.34					47
48	47-48,000	617.50					615.60					606.10					48
49	48-49,000	630.50					628.56					618.86					49
50	$49-50,000	$643.50	$	$	¢	¢	$641.52	$	$	¢	¢	$631.62	$	$	¢	¢	50

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Car Hire Rate Table - Mileage Rates
(Cents Per Mile)

Summary 5

Line No.	Value Bracket (1)	Gondola-Plain: Annual Reduction In Value 1/ (2)	Gondola-Plain: Annual Repair and Maintenance 2/ (3)	Gondola-Plain: Total Mileage Cost 3/ (4)	Gondola-Plain: Charge Per Line-Haul Mile 0-27 Yrs. 4/ (5)	Gondola-Plain: Charge Per Line-Haul Mile Over 27 Yrs. 5/ (6)	Gondola-Equipped: Annual Reduction In Value 1/ (7)	Gondola-Equipped: Annual Repair and Maintenance 2/ (8)	Gondola-Equipped: Total Mileage Cost 3/ (9)	Gondola-Equipped: Charge Per Line-Haul Mile 0-34 Yrs. 4/ (10)	Gondola-Equipped: Charge-Per Line-Haul Mile Over 34 Yrs. 5/ (11)	Hopper-Covered: Annual Reduction In Value 1/ (12)	Hopper-Covered: Annual Repair and Maintenance 2/ (13)	Hopper-Covered: Total Mileage Cost 3/ (14)	Hopper-Covered: Charge-Per Line-Haul Mile 0-29 Yrs. 4/ (15)	Hopper-Covered: Charge Per Line-Haul Mile Over 29 Yrs. 5/ (16)	Line No.
1	$ 0- 1,000	$ 5.78	$	$	¢	¢	$ 5.06	$	$	¢	¢	$ 5.72	$	$	¢	¢	1
2	1- 2,000	17.34					15.18					17.16					2
3	2- 3,000	28.90					25.30					28.60					3
4	3- 4,000	40.46					35.42					40.04					4
5	4- 5,000	52.02					45.54					51.48					5
6	5- 6,000	63.58					55.66					62.92					6
7	6- 7,000	75.14					65.78					74.36					7
8	7- 8,000	86.70					75.90					85.80					8
9	8- 9,000	98.26					86.02					97.24					9
10	9-10,000	109.82					96.14					108.68					10
11	10-11,000	121.38					106.26					120.12					11
12	11-12,000	132.94					116.38					131.56					12
13	12-13,000	144.50					126.50					143.00					13
14	13-14,000	156.06					136.62					154.44					14
15	14-15,000	167.62					146.74					165.88					15
16	15-16,000	179.18					156.86					177.32					16
17	16-17,000	190.74					166.98					188.76					17
18	17-18,000	202.30					177.10					200.20					18
19	18-19,000	213.86					187.22					211.64					19
20	19-20,000	225.42					197.34					223.08					20
21	20-21,000	236.98					207.46					234.52					21
22	21-22,000	248.54					217.58					245.96					22
23	22-23,000	260.10					227.70					257.40					23
24	23-24,000	271.66					237.82					268.84					24
25	24-25,000	283.22					247.94					280.28					25
26	25-26,000	294.78					258.06					291.72					26
27	26-27,000	306.34					268.18					303.16					27
28	27-28,000	317.90					278.30					314.60					28
29	28-29,000	329.46					288.42					326.04					29
30	29-30,000	341.02					298.54					337.48					30
31	30-31,000	352.58					308.66					348.92					31
32	31-32,000	364.14					318.78					360.36					32
33	32-33,000	375.70					328.90					371.80					33
34	33-34,000	387.26					339.02					383.24					34
35	34-35,000	398.82					349.14					394.68					35
36	35-36,000	410.38					359.26					406.12					36
37	36-37,000	421.94					369.38					417.56					37
38	37-38,000	433.50					379.50					429.00					38
39	38-39,000	445.06					389.62					440.44					39
40	39-40,000	456.62					399.74					451.88					40
41	40-41,000	468.18					409.86					463.32					41
42	41-42,000	479.74					419.98					474.76					42
43	42-43,000	491.30					430.10					486.20					43
44	43-44,000	502.86					440.22					497.64					44
45	44-45,000	514.42					450.34					509.08					45
46	45-46,000	525.98					460.46					520.52					46
47	46-47,000	537.54					470.58					531.96					47
48	47-48,000	549.10					480.70					543.40					48
49	48-49,000	560.66					490.82					554.84					49
50	$49-50,000	$572.22	$	$	¢	¢	$500.94	$	$	¢	¢	$566.28	$	$	¢	¢	50

Summary 5

Car Hire Rate Table - Mileage Rates
(Cents Per Mile)

Line No.	Value Bracket (1)	Hopper-Open Top-General Service					Hopper-Open Top-Special Service					Refrigerator-Non-Mechanical					Line No.
		Annual Reduction In Value 1/ (2)	Annual Repair and Maintenance 2/ (3)	Total Mileage Cost 3/ (4)	Charge Per Line-Haul Mile 0- 23 Yrs. 4/ (5)	Charge Per Line-Haul Mile Over 23 Yrs. 5/ (6)	Annual Reduction In Value 1/ (7)	Annual Repair and Maintenance 2/ (8)	Total Mileage Cost 3/ (9)	Charge Per Line-Haul Mile 0- 38 Yrs. 4/ (10)	Charge-Per Line-Haul Mile Over 38 Yrs. 5/ (11)	Annual Reduction In Value 1/ (12)	Annual Repair and Maintenance 2/ (13)	Total Mileage Cost 3/ (14)	Charge-Per Line-Haul Mile 0- 25 Yrs. 4/ (15)	Charge Per Line-Haul Mile Over 25 Yrs. 5/ (16)	
1	$ 0- 1,000	$ 6.70	$	$	¢	¢	$ 4,06	$	$	¢	¢	$ 7,12	$	$	¢	¢	1
2	1- 2,000	20.10					12,18					21,36					2
3	2- 3,000	33.50					20,30					35,60					3
4	3- 4,000	46.90					28,42					49,84					4
5	4- 5,000	60.30					36,54					64,08					5
6	5- 6,000	73.70					44,66					78,32					6
7	6- 7,000	87.10					52,78					92,56					7
8	7- 8,000	100.50					60,90					106,80					8
9	8- 9,000	113.90					69,02					121,04					9
10	9-10,000	127.30					77,14					135,28					10
11	10-11,000	140.70					85,26					149,52					11
12	11-12,000	154.10					93,38					163,76					12
13	12-13,000	167.50					101,50					178,00					13
14	13-14,000	180.90					109,62					192,24					14
15	14-15,000	194.30					117,74					206,48					15
16	15-16,000	207.70					125,86					220,72					16
17	16-17,000	221.10					133,98					234,96					17
18	17-18,000	234.50					142,10					249,20					18
19	18-19,000	247.90					150,22					263,44					19
20	19-20,000	261.30					158,34					277,68					20
21	20-21,000	274.70					166,46					291,92					21
22	21-22,000	288.10					174,58					306,16					22
23	22-23,000	301.50					182,70					320,40					23
24	23-24,000	314.90					190,82					334,64					24
25	24-25,000	328.30					198,94					348,88					25
26	25-26,000	341.70					207,06					363,12					26
27	26-27,000	355.10					215,18					377,36					27
28	27-28,000	368.50					223,30					391,60					28
29	28-29,000	381.90					231,42					405,84					29
30	29-30,000	395.30					239,54					420,08					30
31	30-31,000	408.70					247,66					434,32					31
32	31-32,000	422.10					255,78					448,56					32
33	32-33,000	435.50					263,90					462,80					33
34	33-34,000	448.90					272,02					477,04					34
35	34-35,000	462.30					280,14					491,28					35
36	35-36,000	475.70					288,26					505,52					36
37	36-37,000	489.10					296,38					519,76					37
38	37-38,000	502.50					304,50					534,00					38
39	38-39,000	515.90					312,62					548,24					39
40	39-40,000	529.30					320,74					562,48					40
41	40-41,000	542.70					328,86					576,72					41
42	41-42,000	556.10					336,98					590,96					42
43	42-43,000	569.50					345,10					605,20					43
44	43-44,000	582.90					353,22					619,44					44
45	44-45,000	596.30					361,34					633,68					45
46	45-46,000	609.70					369,46					647,92					46
47	46-47,000	623.10					377,58					662,16					47
48	47-48,000	636.50					385,70					676,40					48
49	48-49,000	649.90					393,82					690,64					49
50	$49-50,000	$663.30	$	$	¢	¢	$401,94	$	$	¢	¢	$704,88	$	$	¢	¢	50

Summary 5

Car Hire Rate Table - Mileage Rates
(Cents Per Mile)

Line No.	Value Bracket (1)	Refrigerator - Mechanical					Flat - TOFC/COFC					Flat - Multi-Level					Line No.
		Annual Reduction In Value 1/ (2)	Annual Repair and Maintenance 2/ (3)	Total Mileage Cost 3/ (4)	Charge Per Line-Haul Mile 0-26 Yrs. 4/ (5)	Charge Per Line-Haul Mile Over 26 Yrs. 5/ (6)	Annual Reduction In Value 1/ (7)	Annual Repair and Maintenance 2/ (8)	Total Mileage Cost 3/ (9)	Charge Per Line-Haul Mile 0-29 Yrs. 4/ (10)	Charge-Per Line-Haul Mile Over 29 Yrs. 5/ (11)	Annual Reduction In Value 1/ (12)	Annual Repair and Maintenance 2/ (13)	Total Mileage Cost 3/ (14)	Charge-Per Line-Haul Mile 0-25 Yrs. 4/ (15)	Charge Per Line-Haul Mile Over 25 Yrs. 5/ (16)	
1	$ 0- 1,000	$ 6.76	$	$	¢	¢	$ 5.66	$	$	¢	¢	$ 7.12	$	$	¢	¢	1
2	1- 2,000	20.28					16.98					21.36					2
3	2- 3,000	33.80					28.30					35.60					3
4	3- 4,000	47.32					39.62					49.84					4
5	4- 5,000	60.84					50.94					64.08					5
6	5- 6,000	74.36					62.26					78.32					6
7	6- 7,000	87.88					73.58					92.56					7
8	7- 8,000	101.40					84.90					106.80					8
9	8- 9,000	114.92					96.22					121.04					9
10	9-10,000	128.44					102.56					135.28					10
11	10-11,000	141.96					118.86					149.52					11
12	11-12,000	155.48					130.18					163.76					12
13	12-13,000	169.00					141.50					178.00					13
14	13-14,000	182.52					152.82					192.24					14
15	14-15,000	196.04					164.14					206.48					15
16	15-16,000	209.56					175.46					220.72					16
17	16-17,000	223.08					186.78					234.96					17
18	17-18,000	236.60					198.10					249.20					18
19	18-19,000	250.12					209.42					263.44					19
20	19-20,000	263.64					220.74					277.68					20
21	20-21,000	277.16					232.06					291.92					21
22	21-22,000	290.68					243.38					306.16					22
23	22-23,000	304.20					254.70					320.40					23
24	23-24,000	317.72					266.02					334.64					24
25	24-25,000	331.24					277.34					348.88					25
26	25-26,000	344.76					288.66					363.12					26
27	26-27,000	358.28					299.98					377.36					27
28	27-28,000	371.80					311.30					391.60					28
29	28-29,000	385.32					322.62					405.84					29
30	29-30,000	398.84					333.94					420.08					30
31	30-31,000	412.36					345.26					434.32					31
32	31-32,000	425.88					356.58					448.56					32
33	32-33,000	439.40					367.90					462.80					33
34	33-34,000	452.92					379.22					477.04					34
35	34-35,000	466.44					390.54					491.28					35
36	35-36,000	479.96					401.86					505.52					36
37	36-37,000	493.48					413.18					519.76					37
38	37-38,000	507.00					424.50					534.00					38
39	38-39,000	520.52					435.82					548.24					39
40	39-40,000	534.04					447.14					562.48					40
41	40-41,000	547.56					458.46					576.72					41
42	41-42,000	561.08					469.78					590.96					42
43	42-43,000	574.60					481.10					605.20					43
44	43-44,000	588.12					492.42					619.44					44
45	44-45,000	601.64					503.74					633.68					45
46	45-46,000	615.16					515.06					647.92					46
47	46-47,000	628.68					526.38					662.16					47
48	47-48,000	642.20					537.70					676.40					48
49	48-49,000	655.72					549.02					690.64					49
50	$49-50,000	$669.24	$	$	¢	¢	$560.34	$	$	¢	¢	$704.88	$	$	¢	¢	50

Car Hire Rate Table - Mileage Rates
(Cents Per Mile)

Summary 5

		Flat - General Service					Flat - Other					All Other Cars					
Line No.	Value Bracket (1)	Annual Reduction In Value 1/ (2)	Annual Repair and Maintenance 2/ (3)	Total Mileage Cost 3/ (4)	Charge Per Line-Haul Mile 0- 33 Yrs. 4/ (5)	Charge Per Line-Haul Mile Over 33 Yrs. 5/ (6)	Annual Reduction In Value 1/ (7)	Annual Repair and Maintenance 2/ (8)	Total Mileage Cost 3/ (9)	Charge Per Line-Haul Mile 0-37 Yrs. 4/ (10)	Charge Per Line-Haul Mile Over 37 Yrs. 5/ (11)	Annual Reduction In Value 1/ (12)	Annual Repair and Maintenance 2/ (13)	Total Mileage Cost 3/ (14)	Charge Per Line-Haul Mile 0-30 Yrs. 4/ (15)	Charge Per Line-Haul Mile Over 30 Yrs. 5/ (16)	Line No.
1	$ 0- 1,000	$ 7.12	$	$	¢	¢	$ 4.44	$	$	¢	¢	$ 5.54	$	$	¢	¢	1
2	1- 2,000	21.36					13.32					16.62					2
3	2- 3,000	35.60					22.20					27.70					3
4	3- 4,000	49.84					31.08					38.78					4
5	4- 5,000	64.08					39.96					49.86					5
6	5- 6,000	78.32					48.84					60.94					6
7	6- 7,000	92.56					57.72					72.02					7
8	7- 8,000	106.80					66.60					83.10					8
9	8- 9,000	121.04					75.48					94.18					9
10	9-10,000	135.28					84.36					105.26					10
11	10-11,000	149.52					93.24					116.34					11
12	11-12,000	163.76					102.12					127.42					12
13	12-13,000	178.00					111.00					138.50					13
14	13-14,000	192.24					119.88					149.58					14
15	14-15,000	206.48					128.76					160.66					15
16	15-16,000	220.72					137.64					171.74					16
17	16-17,000	234.96					146.52					182.82					17
18	17-18,000	249.20					155.40					193.90					18
19	18-19,000	263.44					164.28					204.98					19
20	19-20,000	277.68					173.16					216.06					20
21	20-21,000	291.92					182.04					227.14					21
22	21-22,000	306.16					190.92					238.22					22
23	22-23,000	320.40					199.80					249.20					23
24	23-24,000	334.64					208.68					260.38					24
25	24-25,000	348.88					217.56					271.46					25
26	25-26,000	363.12					226.44					282.54					26
27	26-27,000	377.36					235.32					293.62					27
28	27-28,000	391.60					244.20					304.70					28
29	28-29,000	405.84					253.08					315.78					29
30	29-30,000	420.08					261.96					326.86					30
31	30-31,000	434.32					270.84					337.94					31
32	31-32,000	448.56					279.72					349.02					32
33	32-33,000	462.80					288.60					360.10					33
34	33-34,000	477.04					297.48					371.18					34
35	34-35,000	491.28					306.36					382.26					35
36	35-36,000	505.52					315.24					393.34					36
37	36-37,000	519.76					324.12					404.42					37
38	37-38,000	534.00					333.00					415.50					38
39	38-39,000	548.24					341.88					426.58					39
40	39-40,000	562.48					350.76					437.66					40
41	40-41,000	576.72					359.64					448.74					41
42	41-42,000	590.96					368.52					459.82					42
43	42-43,000	605.20					377.40					470.90					43
44	43-44,000	619.44					386.28					481.98					44
45	44-45,000	633.68					395.16					493.06					45
46	45-46,000	647.92					404.04					504.14					46
47	46-47,000	662.16					412.92					515.22					47
48	47-48,000	676.40					421.80					526.30					48
49	48-49,000	690.64					430.68					537.38					49
50	$49-50,000	$704.88	$	$	¢	¢	$439.56	$	$	¢	¢	$548.46	$	$	¢	¢	50

1/ Forty percent of the depreciation charge, Summary 4 (for each type) multiplied by the mid-point of the value bracket.
2/ Fifty percent of indexed average repair cost per car, Summary 3 (for each type). Applicable columns.
3/ Annual reduction in value plus Annual repair and maintenance (for each type). Applicable columns.
4/ Total mileage cost divided by average line-haul miles per car, Summary 3 (for each type). Applicable columns.
5/ Fifty percent of indexed average repair cost per car, Summary 3 (for each type) divided by average line-haul miles per car, Summary 3 (for each type). Applicable columns.

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Summary 6

Car Hire Rate Table - Daily Rates
Type of Car ________
(Dollars Per Day)

Value Bracket (1)	0-1 Year		1-2 Years		2-3 Years		3-4 Years		4-5 Years		5-6 Years		6-7 Years		7-8 Years		8-9 Years		Line No.
	Annual 1/ (2)	Daily 2/ (3)	Annual 1/ (4)	Daily 2/ (5)	Annual 1/ (6)	Daily 2/ (7)	Annual 1/ (8)	Daily 2/ (9)	Annual 1/ (10)	Daily 2/ (11)	Annual 1/ (12)	Daily 2/ (13)	Annual 1/ (14)	Daily 2/ (15)	Annual 1/ (16)	Daily 2/ (17)	Annual 1/ (18)	Daily 2/ (19)	
$ 0- 1,000	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	1
1- 2,000																			2
2- 3,000																			3
3- 4,000																			4
4- 5,000																			5
5- 6,000																			6
6- 7,000																			7
7- 8,000																			8
8- 9,000																			9
9-10,000																			10
10-11,000																			11
11-12,000																			12
12-13,000																			13
13-14,000																			14
14-15,000																			15
15-16,000																			16
16-17,000																			17
17-18,000																			18
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45-46,000																			46
46-47,000																			47
47-48,000																			48
48-49,000																			49
$49-50,000	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	50

Car Hire Rate Table - Daily Rates
Type of Car ________
(Dollars Per Day)

Summary 6

Line No.	Value Bracket (1)	9-10 Years		10-11 Years		11-12 Years		12-13 Years		13-14 Years		14-15 Years		15-16 Years		16-17 Years		17-18 Years		Line No.
		Annual 1/ (2)	Daily 2/ (3)	Annual 1/ (4)	Daily 2/ (5)	Annual 1/ (6)	Daily 2/ (7)	Annual 1/ (8)	Daily 2/ (9)	Annual 1/ (10)	Daily 2/ (11)	Annual 1/ (12)	Daily 2/ (13)	Annual 1/ (14)	Daily 2/ (15)	Annual 1/ (16)	Daily 2/ (17)	Annual 1/ (18)	Daily 2/ (19)	
1	$ 0- 1,000	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	1
2	1- 2,000																			2
3	2- 3,000																			3
4	3- 4,000																			4
5	4- 5,000																			5
6	5- 6,000																			6
7	6- 7,000																			7
8	7- 8,000																			8
9	8- 9,000																			9
10	9-10,000																			10
11	10-11,000																			11
12	11-12,000																			12
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46	45-46,000																			46
47	46-47,000																			47
48	47-48,000																			48
49	48-49,000																			49
50	$49-50,000	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	50

Car Hire Rate Table - Daily Rates
Type of Car ________
(Dollars Per Day)

Summary 6

Value Bracket (1)	18-19 Years		19-20 Years		20-21 Years		21-22 Years		22-23 Years		23-24 Years		24-25 Years		25-26 Years		26-27 Years		Line No.
	Annual 1/ (2)	Daily 2/ (3)	Annual 1/ (4)	Daily 2/ (5)	Annual 1/ (6)	Daily 2/ (7)	Annual 1/ (8)	Daily 2/ (9)	Annual 1/ (10)	Daily 2/ (11)	Annual 1/ (12)	Daily 2/ (13)	Annual 1/ (14)	Daily 2/ (15)	Annual 1/ (16)	Daily 2/ (17)	Annual 1/ (18)	Daily 2/ (19)	
$0- 1,000	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	1
1- 2,000																			2
2- 3,000																			3
3- 4,000																			4
4- 5,000																			5
5- 6,000																			6
6- 7,000																			7
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46-47,000																			47
47-48,000																			48
48-49,000																			49
$49-50,000	$	$	$	$	$	$	$		$	$	$	$	$	$	$	$	$	$	50

Car Hire Rate Table - Daily Rates
Type of Car ________
(Dollars Per Day)

Summary 6

Line No.	Value Bracket (1)	27-28 Years		28-29 Years		29-30 Years		30-31 Years		31-32 Years		32-33 Years		33-34 Years		34-35 Years		35-36 Years		Line No.
		Annual 1/ (2)	Daily 2/ (3)	Annual 1/ (4)	Daily 2/ (5)	Annual 1/ (6)	Daily 2/ (7)	Annual 1/ (8)	Daily 2/ (9)	Annual 1/ (10)	Daily 2/ (11)	Annual 1/ (12)	Daily 2/ (13)	Annual 1/ (14)	Daily 2/ (15)	Annual 1/ (16)	Daily 2/ (17)	Annual 1/ (18)	Daily 2/ (19)	
1	$ 0- 1,000	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	1
2	1- 2,000																			2
3	2- 3,000																			3
4	3- 4,000																			4
5	4- 5,000																			5
6	5- 6,000																			6
7	6- 7,000																			7
8	7- 8,000																			8
9	8- 9,000																			9
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46	45-46,000																			46
47	46-47,000																			47
48	47-48,000																			48
49	48-49,000																			49
50	$49-50,000	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	$	50

Summary 6

Car Hire Rate Table - Daily Rates
Type of Car——————
(Dollars Per Day)

Value Bracket (1)	36-37 Years Annual 1/ (2)	36-37 Years Daily 2/ (3)	37-38 Years Annual 1/ (4)	37-38 Years Daily 2/ (5)	Over 38 Years Annual 1/ (6)	Over 38 Years Daily 2/ (7)	Line No.
$ 0- 1,000	$	$	$	$	$	$	1
1- 2,000							2
2- 3,000							3
3- 4,000							4
4- 5,000							5
5- 6,000							6
6- 7,000							7
7- 8,000							8
8- 9,000							9
9-10,000							10
10-11,000							11
11-12,000							12
12-13,000							13
13-14,000							14
14-15,000							15
15-16,000							16
16-17,000							17
17-18,000							18
18-19,000							19
19-20,000							20
20-21,000							21
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42-43,000							43
43-44,000							44
44-45,000							45
45-46,000							46
46-47,000							47
47-48,000							48
48-49,000							49
49-50,000	$	$	$	$	$	$	50

Fifty percent of indexed average repair cost per car. Summary 3 (by type of car) plus (Investment cost per $1000 original cost, Summary 4, Col. (7) for each year in service multiplied by the mid-point of each value bracket)

Minus the annual reduction in value. Summary 5 (For each type). For applicable columns.

Annual time charge in columns (2), (4), (6), (8), (10), (12), (14), (16), and (18) divided by average per diem days payable per car. Summary 3 (by type). Applicable columns.

This summary will be completed for each type of car. Each rate table will include the number of years based on the service lives of each type of car.

SEPARATION OF RAIL FREIGHT OPERATING EXPENSES, RENTS, TAXES (EXCLUDING FEDERAL INCOME TAXES) AND COST OF CAPITAL BETWEEN PER DIEM FREIGHT- TRAIN CAR OWNERSHIP COSTS AND OTHER COSTS
(DOLLAR AMOUNTS IN THOUSANDS)

Schedule 1

YEAR________

Line No.	Expense Group (1)	Source (2)	Total Freight Expense		Total Ownership Costs		Other Expense		General Overhead		Line No.
			Percent (3)	Amount (4)	Percent (5)	Amount (6)	Percent (7)	Amount (8)	Percent (9)	Amount (10)	
1	Total Way & Structures (Excluding Freight Car Shop Bldg. Exp. & Depreciation)...	A.R. Sch. 320, L.151 minus L.33, Cols.(b),(c),(d),&(e) minus Sch. 322, L.33, col. (b)	xxx	$	xxx	$	xxx	$	xxx	$	1
2	Percent Distribution of Line 1..........	Worksheet 1, L.8, cols.(5),(6),& (7)	100.000%	xxx	.528%	xxx	95.912%	xxx	3.560%	xxx	2
3	Repairs & Maintenance - Shop Buildings - Freight Cars..........	AR Sch.320,L.33,cols.(b)(c)(d)&(e)	xxx	$	xxx	$	xxx	$	xxx	$	
4	Percent Distribution of Line 3..........	Footnote 1, Worksheet 1, Sheet 2, L. 3, 4, 5, and 6, col. (10)	100.000%	xxx	27.317%	xxx	72.011%	xxx	.672%	xxx	4
5	Way & Structures Depreciation (Excluding Freight Car Shop Bldg. Depreciation)....	Footnote 1 to this Sch., L. 9, Col. (3)	xxx	$	xxx	$	xxx	$	xxx	$	5
6	Percent Distribution of Line 5..........	Worksheet 1. L. 16, cols. (5), (6), and (7)	100.000%	xxx	.641%	xxx	93.795%	xxx	5.564%	xxx	6
7	Depreciation - Freight Car Shop Buildings..........	Footnote 1 to this Sch., L. 4, col. (3)	xxx	$	xxx	$	xxx	$	xxx	xxx	7
8	Percent Distribution of Line 7..........	Footnote 1, Worksheet 1, Sheet 2, L. 9, 10, & 11, col. (10)	100.000%	xxx	81.351%	xxx	18.649%	xxx	xxx	xxx	8
9	Total Way and Structures Expense..........	Sum of L. 1, 3, 5, and 7	xxx	$	xxx	$	xxx	$	xxx	$	
10	Total Equipment Expense - Other than Freight Cars (Excluding Depreciation)..........	AR Sch.320,L.324 minus L.238,cols.(b)(c)(d)&(e)&L.213&317,col.(e)	xxx	$	xxx	$	xxx	$	xxx	$	10
11	Percent Distribution of Line 10..........	Worksheet 1, L. 24, cols. (5), (6), & (7)	100.000%	xxx	11.197%	xxx	85.847%	xxx	2.956%	xxx	11
12	Equipment Depreciation - Other than Freight Cars..........	AR Sch. 320, L. 213 & 317, col. (e)	xxx	$	xxx	$	xxx	$	xxx	$	12
13	Percent Distribution of Line 12..........	Worksheet 1, L. 32, cols. (5), (6), & (7)	100.000%	xxx	1.842%	xxx	93.477%	xxx	4.681%	xxx	13
14	Total Equipment Expense - Other Than Freight Cars..........	Sum of L. 10 and 12	xxx	$	xxx	$	xxx	$	xxx	$	14
15	Total Transportation Expense..........	AR Sch.320,L.529,cols.(b)(c)(d)&(e)	xxx	$	xxx	$	xxx	$	xxx	$	15
16	Percent Distribution of Line 15..........	Worksheet 2 Summary	100.000%	xxx	.026%	xxx	98.[illegible]%	xxx	1.121%	xxx	16
17	Total General and Administrative Expenses (Excluding Property Taxes)..........	AR Sch. 320, L.619,cols. (b),(c),(d),&(e) minus L.614, col. (e)	xxx	$	xxx		xxx		[illegible]		17
18	Percent Distribution of Line 17..........	Worksheet 1, L. 40, cols. (6) & (7)	100.000%	xxx	xxx	xxx	28.22[illegible]%	xxx	71.77[illegible]%	xxx	18
19	Property Taxes assigned to Freight Cars - Distribute on Basis of Line 35..........	Footnote 2, L. 10, col. (4)	xxx	$	xxx	$	xxx	$	xxx	xxx	19
20	Property Taxes assigned to Property Other than Freight Cars..........	Footnote 2, L. 10, col. (5)	xxx	$	xxx	$	xxx	$	xxx	xxx	20
21	Percent Distribution of Line 20..........	Per Diem Cost Study - 1960 Work-table 14, Sheet 2 of 4, L. 41, col.(5) + (7) ÷ col. (3) & col.(6) + (8) + (9) ÷ col. (3)	100.000%	xxx	1.410%	xxx	98.590%	xxx	xxx	xxx	21
22	Distribution of General Overhead..........	Footnote 3, L.10, cols. (4), (6), & (8)	xxx	$	xxx	$	xxx	$	xxx	xxx	22
23	Distribution of Depreciation Charged to General Overhead..........	Footnote 4, L. 2, cols. (4), (6), & (8)	xxx	$	xxx	$	xxx	$	xxx	xxx	23
	Cost of Capital on Depreciated Investment After Federal Income Taxes										
24	Freight-Train Cars..........	Footnote 5, L. 14, col. (3)	xxx	$	xxx	$	xxx	$	xxx	xxx	24
25	Percent Distribution of Line 24..........	Per Diem Cost Study - 1960, Work-table 17, Sheet 2 of 4, L. 18	100.000%	xxx	96.060%	xxx	3.940%	xxx	xxx	xxx	25
26	Property Other Than Freight-Train Cars..........	Footnote 5, L. 15, col. (3)	xxx	$	xxx	$	xxx	$	xxx	xxx	26
27	Percent Distribution of Line 26..........	Per Diem Cost Study - 1960 Work-table 17, Sheet 2 of 4, L. 42, col.(5) + (7) ÷ col. (3) & col.(6) + (8) + (9) ÷ col. (3)	100.000%	xxx	.891%	xxx	99.109%	xxx	xxx	xxx	27
28	Working Capital	Footnote 6, L. 3, col. (3)	xxx	$	xxx	$	xxx	$	xxx	xxx	28
29	Percent Distribution of Line 28	Per Diem Cost Study - 1960, Work-table 18, Sheet 1 of 1, L. 15	100.000%	xxx	10.075%	xxx	89.925%	xxx	xxx	xxx	29
30	Total Cost of Capital..........	Sum of L. 24, 26, & 28	xxx	$	xxx	$	xxx	$	xxx	xxx	30

SEPARATION OF RAIL FREIGHT OPERATING EXPENSES, RENTS, TAXES (EXCLUDING FEDERAL INCOME TAXES) AND COST OF CAPITAL BETWEEN PER DIEM FREIGHT-TRAIN CAR OWNERSHIP COSTS AND OTHER COSTS
(DOLLAR AMOUNTS IN THOUSANDS)

YEAR______

Schedule 1

Line No.	Expense Item	Source (2)	Total Freight Expense		Total Ownership Costs		Other Expense		General Overhead		Line No.
			Percent (3)	Amount (4)	Percent (5)	Amount (6)	Percent (7)	Amount (8)	Percent (9)	Amount (10)	
31	Cost of Handling Non-Revenue Freight Applicable to Repair of Equipment	Footnote [illegible], L. 1, col. [illegible]	xxx	$ -0-	xxx	$ DR	xxx	$ CR	xxx	xxx	31
32	Cost of Switching Bad Order Freight-Train Cars	Footnote [illegible], L. [illegible], col. [illegible]	xxx	$ -0-	xxx	$ DR	xxx	$ CR	xxx	xxx	32
33	Hire of Freight-Train Cars - Net	Footnote 3, L. 1, cols. (x), (x), and (x)	xxx	$	xxx	$	xxx	$	xxx	xxx	33
34	Depreciation Freight-Train Cars	[illegible] Sch. 410, L. 272, col. (x)	xxx	$	xxx	$	xxx	$	xxx	xxx	34
35	Percent Distribution of Line 34	Per Diem Cost Study - 1960, work-table 4, sheet [illegible] of 1, L. [illegible], cols. (5) & (9)	100.000%	xxx	95.781%	xxx	4.219%	xxx	xxx	xxx	35
36	Freight-Train Car Repairs (Net Expense)	Annual Report-Supporting Schedule (For Lines 37 thru 51)	xxx	xxx	xxx	xxx	xxx	xxx	xxx	xxx	36
37	Plain Boxcars 40 Foot		xxx	$	xxx	$	xxx	$	xxx	xxx	37
38	Plain Boxcars 50 Foot & Longer		xxx	$	xxx	$	xxx	$	xxx	xxx	38
39	Equipped Boxcars		xxx	$	xxx	$	xxx	$	xxx	xxx	39
40	Plain Gondola		xxx	$	xxx	$	xxx	$	xxx	xxx	40
41	Equipped Gondola		xxx	$	xxx	$	xxx		xxx	xxx	41
42	Covered Hoppers		xxx	$	xxx	$	xxx	$	xxx	xxx	42
43	Open Top Hoppers - General Service		xxx	$	xxx	$	xxx	$	xxx	xxx	43
44	Open Top Hoppers - Special Service		xxx	$	xxx	$	xxx	$	xxx	xxx	44
45	Non-Mechanical Refrigerator		xxx	$	xxx	$	xxx	$	xxx	xxx	45
46	Mechanical refrigerator		xxx	$	xxx	$	xxx	$	xxx	xxx	46
47	TOFC/COFC Flat		xxx	$	xxx	$	xxx	$	xxx	xxx	47
48	Multi-Level Flat		xxx	$	xxx	$	xxx	$	xxx	xxx	48
49	General Service Flat		xxx	$	xxx	$	xxx	$	xxx	xxx	49
50	Other Flat		xxx	$	xxx	$	xxx	$	xxx	xxx	50
51	Other Cars		xxx	$	xxx	$	xxx	$	xxx	xxx	51
52	Total - All Freight Cars	Sum of Lines 37 thru 51	xxx	$	xxx	$	xxx	$	xxx	xxx	52
53	Percent Distribution of Lines 37 thru 51	Notice of Proposed Rulemaking served November 11, 1976 Table 1, Page 11	100.000%	xxx	61.314%	xxx	15.462%	xxx	xxx	xxx	53
54	Total	Sum of Lines 9, 14, 15, 17, 19, 20, 30, 31, 32, 33, 34, & 52	xxx	$	xxx	$	xxx	$	xxx	$	54

Footnotes to Schedule 1 (Dollar Amounts in Thousands)

1/ Distribution of Way and Structures Depreciation, Shop Buildings Depreciation and Other Way and Structures Depreciation. (Insert in Schedule 1, Sheet 1, Line 5, Col. (4) amount shown on Line 4 and Insert in Schedule 1, Sheet 1, Line 7, Col. (4) amount shown on Line 5).

Line No.	Item (1)	Source (2)	Amount (3)	Line No.
1	Total Way and Structures Depreciation...	Schedule 322, L. 39, col. (b)	$	1
2	Total Depreciation, Shops & Engine-houses..................................	Schedule 322, Line 16, col. (b)	$	2
3	Percentage of Shop & Enginehouse Depreciation Applicable to Shop Buildings - Freight Cars...................	Per Diem Cost Study, 1960 - Work Table 9, Sheet 1, Line 17, col. (6)	28.961%	3
4	Shop Buildings Depreciation - Freight Cars..................................	Line 2 x Line 3	$	4
5	Other Way and Structures Depreciation...	Line 1 minus line 4	$	5

2/ Distribution of Property Taxes - Separation of property taxes between freight-train cars and property other than freight-train cars (Insert in line 19, column (4), Schedule 1, Sheet 1, amount shown on line 10 column (4), Insert in line 20, column (4), Schedule 1, Sheet 1, amount shown on line 10, column (5).)

Line No.	Item (1)	Source (2)	Total (3)	Freight (4)	Passenger and special services or unrelated (5)	Line No.
	A. Computation of Property Tax Ratio and Distribution Factors					
1	Distribution of return on original cost of road and equipment	Rail Fac. A	$	$	$	1
2	Percentage distribution of line 1	Columns (4) and (5) divided by column (3)	100.000%		%	2
3	Original cost of road and equipment plus present value of land and rights (Distribute on the basis of line 2).	A.R. Sch. 211 W-1, line 39, col. (d) and Sch. 211 W-2, lines 39, 51, and 52, cols. (b), (c), (d), and (e)	$	$	$	3
4	Property taxes applicable to freight and passenger services	Annual Report, Schedule 320, line 14, cols. (c) & (f)	$	$ xxx	xxx	4
5	Tax ratio	Line 4, col. (3) divided by line 3, col. (3)			%	5
	Item (1)	Source (2)	Total (3)	Freight (4)	Other than freight-train cars (5)	
	B. Distribution of Freight Service Portion of Property Taxes between Freight-train Cars and Car Repair Facilities					
6	Freight portion of original cost of road and equipment plus present value of land and rights	Line 3, col. (4)	$	xxx	xxx	6
7	Original cost of freight-train cars (Insert in cols. (3) and (4)).	A.R. Sch. 211 W-2, line 39, cols. (b), (c), (d), and (e)	$	$	xxx	7
8	Original cost of property other than freight cars (Insert in cols. (3) and (5))	Line 6, col. (3) minus line 7, col. (3)	$	xxx	$	8
9	Distribution of line 6	Line 7 plus line 8	$	$	$	9
10	Property taxes on freight service portion of original cost of road and equipment plus present value of land and rights - Distributed.	Line 9, cols. (3), (4) and (5) times line 5, col. (3)	$		$	10

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Footnotes to Schedule 1 (Dollar Amounts in Thousands) (Continued)

Distribution of General Overhead - Excluding Depreciation and Property Taxes (Insert in line 22, col. (4), (6), and (8), Schedule 1, Sheet 1, amount shown on line 1C, col. (4), (6), and (8)

Line No.	Item (1)	Source (2)	Total freight expense		Ownership costs		Other expenses		General overhead		Line No.
			Percent (3)	Amount (4)	Percent (5)	Amount (6)	Percent (7)	Amount (8)	Percent (9)	Amount (10)	
	Distribution of General Overhead										
1	Hire of freight-train cars	a/ L.4, cols. (4), (6), and (8)	xxx	$	xxx	$	xxx	$	xxx	xxx	1
2	Maintenance of way and structures (Excl. depreciation)	Schedule 1, sheet 1, line 1, plus line 3 cols. (4), (6), (8) and (10)	xxx	$	xxx	$	xxx	$	xxx	$	2
3	Maintenance of equipment other than freight-train cars (Excl. depreciation)	Schedule 1, sheet 1, line 10, cols. (4), (6), (8) and (10)	xxx	$	xxx	$	xxx	$	xxx	$	3
4	Maintenance of freight-train cars (Excl. depreciation)	Schedule 1, sheet 1, line 52, cols. (4), (6) and (8)	xxx	$	xxx	$	xxx	$	xxx	xxx	4
5	Transportation	Schedule 1, sheet 1, line 1, cols. (4) and (6), (8), and (10)	xxx	$	xxx	$	xxx	$	xxx	$	5
6	General and administrative (Excluding property taxes)	Schedule 1, sheet 1, line 17, cols. (4), (8), and (10)	xxx	$	xxx	xxx	xxx	$	xxx	$	6
7	Total	Lines 1 through line 6	xxx	$	xxx	$	xxx	$	xxx	$	7
8	Base for distributing general overhead	Line 1 plus line 7, cols. (6) and (8) *	xxx	$	xxx	$	xxx	$	xxx	xxx	8
9	Percentage distribution of line 8	Line 8, col. (6) and (8) divided by col. (4)	100.000%	xxx		xxx		xxx	xxx	xxx	9
10	Distribution of General Overhead	Line 7, col. (10) - distribute on basis of line 9	xxx	$	xxx	$	xxx	$	xxx	xxx	10
11	Total Operating Expense Excl. Depreciation but after Distribution of General Overhead	Line 8 plus line 10	xxx	$	xxx	$	xxx	$	xxx	xxx	11

* Cross add for total

a/ **Hire of Freight Train Cars - Insert in line 1, cols. (4), (6), and (8) above, amounts shown on line 4, cols. (4), (6), and (8).**

Line No.	Item (1)	Source (2)	Total Amount		Ownership Costs		Other Expenses		Line No.
			Percent (3)	Amount (4)	Percent (5)	Amount (6)	Percent (7)	Amount (8)	
1	Hire of Mileage Cars	Annual Report - Rents for Interchange: Freight-Cars and Trailers (For lines 1 through 3)	100.000%	$	xxx	xxx	100.000%	$	1
2	Hire of Time-Mileage Cars		100.000%	$	xxx	xxx	100.000%	$	2
3	Hire of Other Cars		100.000%	$	73.752%	$	26.248%	$	3
4	Total	Sum of lines 1, 2, and 3	xxx	$	xxx	$	xxx	$	4

Footnotes to Schedule 1 (Dollar Amounts In Thousands) (Continued)

8/ Distribution of Depreciation charged to general overhead. (Insert in line 23, col. (4), (6), and (8), Schedule 1, Sheet 1, amount shown on line 3, col. (4), (6), and (8).)

Line No.	Item (1)	Source (2)	Total freight expense		Ownership costs		Other expenses		General overhead		Line No.
			Percent (3)	Amount (4)	Percent (5)	Amount (6)	Percent (7)	Amount (8)	Percent (9)	Amount (10)	
1	Depreciation of other than freight-train cars	Schedule 1, sheet 1, lines 5 and 12 cols. (4), (6), (8) and (10)	xxx	$	xxx	$	xxx	$	xxx	$	1
2	Distribution of Depreciation Charged to General Overhead	Line 1, col. (10) distribute on the basis of line 9, 3/	xxx	$	xxx	$	xxx	$	xxx	xxx	2
3	Total	Sum of lines 1 and 2	xxx	$ *	xxx	$	xxx	$	xxx	xxx	3

* Cross add for total

9/ Cost of Capital (Insert in lines 24 and 26 of Schedule 1, Sheet 1, Col. (4) the amount shown on line 14 and 15 respectively of this footnote)

Line No.	Item (1)	Source (2)	Amount (3)	Line No.
1	Depreciated Investment (Original Cost Basis) on road property and equipment.	Rail Form A	$	1
2.	Rate of Interest on outstanding debt (excluding allowance for income taxes).	a/ Line 11, col. (3)		2
3	Cost of Capital excluding allowance for income taxes on depreciated investment (Original Cost Basis) on road property and equipment	Line 1 x line 2	$	3
4	Total fixed charges plus contingent interest	Annual Report, Schedule 300, lines 31 and 33, col. (b)		4
5	Cost of capital minus fixed and contingent charges	Line 3 minus line 4	$	5
6	Federal income taxes.	Line 5 x 0.9231 b/	$	6
7	Cost of Capital plus federal income taxes	Line 3 plus line 6	$	7
8	Ratio of Cost of Capital plus federal income taxes to cost of capital excluding federal income taxes.	Line 7 divided by line 3 (5 decimals)		8
9	Rate of interest including allowance for federal income taxes.	Line 2 x line 8 (3 decimals)	%	9
10	Freight service portion of total cost of capital plus federal income taxes	Line 7 x ____ % from line 2, col. (4) 2/ to Schedule 1	$	10
11	Original Cost of freight-train cars	Line 2, col. (3) of 2/ to Schedule 1	$	11
12	Reserve for depreciation of freight-train cars.	Rail Form A	$	12
13	Depreciated investment in freight-train cars	Line 11 minus line 12	$	13
14	Cost of Capital, including allowance for income taxes, on investment in freight-train cars . . .	Line 13 x line 9 - to line 24, Schedule 1, sheet 1, col. (4)	$	14
15	Cost of Capital on investment in property (road and equipment) other than freight-train cars . .	Line 10 minus line 14 - to line 26, Schedule 1, sheet 1, col. (4)	$	15

a/ Rate of Interest on Outstanding Debt (Insert in line 2, col. (3) above)

Line No.	Item (1)	Source (2)	Amount (3)	Line No.
1	Loans and notes payable (Account 751)	Annual Report, Sch. 200, line 50, col. (b) + col. (c) ÷ 2.0	$	1
2	Long term debt due within one year (Account 764)	Annual Report, Sch. 200, line 62, col. (b) + col. (c) ÷ 2.0	$	2
3	Long term debt due after one year (Accounts 765, 766, 767, 768, & 769)	Annual Report, Sch. 200, lines 65, 66, 70, 71, & 72, col. (b) + col. (c) ÷ 2.0	$	3
4	Total outstanding debt	Sum of lines 1, 2 and 3	$	4
5	Income from sinking and other reserve funds (Account 516).	Annual Report, Sch. 300, line 9, col. (b)	$	5
6	Release of premium on funded debt (Account 517)	Annual Report, Sch. 300, line 10, col. (b)	$	6
7	Interest on funded debt (Account 546)	Annual Report, Sch. 300, line 27 plus line 28, col. (b)	$	7
8	Interest on unfunded debt (Account 547).	Annual Report, Sch. 300, line 29, col. (b)	$	8
9	Amortization of discount on funded debt (Account 548).	Annual Report, Sch. 300, line 30, col. (b)	$	9
10	Total interest	Sum of lines 5, 6, 7, 8 and 9	$	10
11	Interest rate on outstanding debt.	Line 10 divided by line 4	%	11

b/ Income Tax Ratio (insert in line 6, col. (2))
48% tax divided by 52% remainder after tax = 0.9231
based on 48% corporate federal income tax rate
in effect for the year 19__

Footnotes to Schedule 1 (Amounts in Thousands) (Continued)

9/ Working Capital (Insert in line 20 of Schedule 1, sheet 1, col. (4))

Line No.	Item (1)	Source (2)	Amount (3)	Line No.
1	Total working capital	Rail Form A	$	1
2	Rate of interest including allowance for federal income tax	Line 9, col. (3) of 3/	%	2
3	Cost of capital, including allowance for income taxes on freight service portion of working capital	Line 1 x line 2	$	3

_/ Cost of Handling Non-revenue Freight Applicable to Repair of Equipment (Insert in Schedule 1, sheet 2, line 31 as a debit in col. (6) and as a credit in col. (8), amount shown on line 15)

Line No.	Item (1)	Source (2)	Amount (3)	Line No.
1	Ton-miles, non-revenue freight in road service	Form OS-A, Line 147, col. (d)		1
2	Ratio applicable to equipment repairs	Per diem cost study, year 1960, WT 15, sheet 1, line 30, col. (3)	.11046	2
3	Ton-miles of non-revenue freight applicable to equipment repairs	Line 1 x line 2		3
4	Total operating expense, rents, taxes, depreciation and cost of capital	e/ Line 7, col. (3)	$	4
5	Percentage of expenses not applicable to non-revenue freight	5-yr. average, 1970-1974, Work Sheet 3, line 8	4.388%	5
6	Expenses not applicable to non-revenue freight	Line 4 x line 5	$	6
7	Expenses applicable to revenue and non-revenue freight	Line 4 minus line 6	$	7
8	Ton-miles revenue freight in road service	Form OS-A, Line 143, col. (d)		8
9	Total ton-miles, revenue and non-revenue freight	Line 1 plus line 8		9
10	Cost per ton-mile, revenue and non-revenue freight	Line 7 divided by line 9	$	10
11	Total cost of non-revenue freight used for equipment repairs	Line 3 x line 10	$	11
12	Freight service portion (percent) of cost of handling non-revenue freight used for equipment repairs	Per diem cost study, year 1960, WT 15, sheet 2, line 33, col. (6)	78.484%	12
13	Freight service portion of cost of handling non-revenue freight used for equipment repairs	Line 11 x line 12	$	13
14	Percent of line 13 applicable to ownership cost of per diem freight-train cars	Per diem cost study, year 1960, WT 15, sheet 2, line 38, cols. (6) and (8) divided by col. (4)	42.993%	14
15	Cost of handling non-revenue freight used for equipment repairs applicable to ownership cost of per diem freight-train cars	Line 13 x line 14	$	15

e/ Computation of total operating expenses in line 4 above

Line No.	Item (1)	Source (2)	Amount (3)	Line No.
1	Total operating expense excluding depreciation, but after distribution of general overhead	Schedule 1, 3/, line 11, col. (8)	$	1
2	Property taxes assigned to freight-train cars	Schedule 1, sheet 1, line 19, col. (8)	$	2
3	Property taxes assigned to property other than freight-train cars	Schedule 1, sheet 1, line 20 col. (8)	$	3
4	Depreciation - freight-train cars	Schedule 1, sheet 2, line 36 col. (8)	$	4
5	Depreciation - Other than freight-train cars	Schedule 1, 4/, line 5, col. (6)	$	5
6	Cost of capital	Schedule 1, sheet 1, line 30, col. (8)	$	6
7	Total	Sum of lines 1 thru 6	$	7

Footnotes to Schedule 1 (continued)

9/ Cost of Switching Bad Order Cars (Insert in line 32, Schedule 1, sheet 2, as a debit in col. (6) and as a credit in col. (g) the amount shown on line 16)

(Amounts in 000's except where noted)

Line No.	Item (1)	Source (2)	Amount (3)	Line No.
1	Total operating expenses and rents, including overheads applicable to switching of cars	Rail Form A	$	1
2.	Cost of capital on road property.	Rail Form A	$	2
3.	Cost of capital on equipment other than cars (principally switching locomotives).	Rail Form A	$	3
4	Total cost of capital (excluding cars)	Line 2 plus line 3	$	4
5	Ratio of cost of capital plus federal income taxes to cost of capital excluding federal income taxes	Schedule 1, 5/ line 8, col. (3)		5
6	Total cost of capital increased to include income taxes	Line 4 x line 5	$	6
7	Total expenses and cost of capital	Line 1 plus line 6	$	7
8	Total switching locomotive hours (train and yard)	Form OS-A, Train and Yard Service, lines 152 and 153 col. (4) (Whole numbers)		8
9	Ratio of revenue freight portion of the total freight operating expenses to the total freight operating expenses (this ratio includes freight portion of non-revenue).	Per diem cost study-year 1960, WT 16, sheet 1, line 9, col. (7)	.99600	9
10	Total switching locomotive hours-freight adjusted to exclude switching of non-revenue freight for passenger service	Line 8 x line 9		10
11	Cost per switching locomotive hour (train and yard)	Line 7 divided by line 10	$	11
12	Ratio of switch engine hours switching bad order cars to total switching locomotive hours	Per diem cost study-year 1960, WT 16, sheet 1, line 16, col. (3)	.04408	12
13.	Total switch engine hours switching bad order cars	Line 8 x line 12 (Whole numbers)		13
14.	Cost of switching bad order freight-train cars.	Line 11 x line 13	$	14
15.	Percent of line 14 applicable to ownership cost of per diem freight-train cars	Per diem cost study-year 1960, WT 16, sheet 2, line 32, cols. (3) and (7) divided by Col. (3)	85.950%	15
16	Cost of switching bad order freight-train cars applicable to ownership cost of per diem freight-train cars	Line 14 x line 15	$	16

Computation of Percentages Used to Distribute Way and Structures Expenses, Equipment Expenses (Other than Freight-Train Cars)
and General and Administrative Expenses in Schedule 1, Sheet 1

Work Sheet

Line No.	Item (1)	Source (2)	Year (3)	Total Freight Expenses (4)	Ownership Costs (5)	Other Expense (6)	General Overhead (7)	Line No.
1	Way and Structures (Excluding freight car shop expense and Depreciation)	RPN, 7-62, Sch. 1, sh. 2, Sum of Lines 19, 21, 24, 28, and 29 less amounts shown in 1/, L. 3, 4, 5, & 6 for applicable year	1970	$1,361,284	$ 7,302	$ 1,299,287	$ 54,695	1
2			1971	1,376,070	8,254	1,312,410	55,406	2
3			1972	1,686,726	8,630	1,619,214	58,882	3
4			1973	1,795,569	9,630	1,724,070	61,869	4
5			1974	2,088,501	11,078	2,005,246	72,177	5
6	Total	Sum of Lines 1 thru 5		$8,308,150	$44,916	$ 7,960,227	$303,029	6
7	5 year average	Line 6 divided by 5.0		$1,661,630	$ 8,983	$ 1,592,045	$ 60,602	7
8	Percentage	Line 7, col. (5), (6), (7) divided by col. (4)		100.000%	.518%	95.912%	3.565%	8
9	Way and Structure Depreciation (Excluding shop building Depreciation - Freight Cars)	RPN, 7-62, Sch. 1, sh. 2, Sum of Lines 20, 22, 23, and 25 less amounts shown in 1/, L. 9, 10, & 11 for applicable year	1970	$ 152,693	$ 1,099	$ 143,683	$ 8,093	9
0			1971	156,361	1,068	146,885	8,408	10
1			1972	156,327	994	146,590	8,743	11
12			1973	156,627	1,097	146,534	9,096	12
13			1974	161,380	936	151,076	9,368	13
1	Total	Sum of Lines 9 thru 13		$ 783,310	$ 5,016	$ 734,705	$ 43,588	14
15	5 year average	Line 14 divided 5.0		$ 156,662	$ 1,003	$ 146,942	$ 8,717	15
1	Percentage	Line 15, col. (5), (6), (7) divided by col. (4)		100.000%	.661%	93.775%	5.564%	16
17	Equipment Expense - Other than Freight Train Cars (excluding Depreciation)	RPN, 7-62, Sch. 1, sh. 1, Sum of Lines 1, 3, 4, 7, 12, and 14	1970	$ 748,150	$ 87,053	$ 636,210	$ 24,887	17
18			1971	880,826	97,436	760,428	22,962	18
19			1972	928,320	104,532	799,736	24,052	19
20			1973	992,524	111,880	856,767	23,877	20
41			1974	1,116,450	122,480	963,295	30,675	21
22	Total	Sum of Lines 17 thru 21		$4,676,250	$523,621	$4,016,436	$138,213	22
23	5 year average	Line 22 divided by 5.0		$ 935,250	$104,724	$ 803,287	$ 27,643	23
24	Percentage	Line 23, col. (5), (6), (7) divided by col. (4)		100.000%	11.197%	85.867%	2.956%	24
25	Equipment Expense - Other than Freight Train Cars - Depreciation	RPN, 7-62, Sch. 1, sh. 1, Sum of Lines 9, 10, and 13	1970	$ 222,085	$ 3,836	$ 205,027	$ 13,222	25
26			1971	221,270	3,679	206,536	11,055	26
27			1972	225,168	3,596	211,746	9,826	27
28			1973	224,019	3,562	210,555	9,902	28
2			1974	222,302	3,633	208,258	10,411	29
30	Total	Sum of Lines 25 thru 29		$1,114,844	$ 18,306	$1,042,122	$ 54,416	30
3	5 year average	Line 30 divided by 5.0		$ 222,969	$ 3,661	$ 208,425	$ 10,883	31
32	Percentage	Line 31, col. (5), (6), (7) divided by col. (4)		100.000%	1.642%	93.477%	4.881%	32

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Computation of Percentages Used to Distribute Way and Structures Expenses, Equipment Expenses (Other than Freight-Train Cars) and General and Administrative Expense in Schedule 1, Sheet 1

Work Sheet

Line No.	Item (1)	Source (2)	Year (3)	Total Freight Expenses (4)	Ownership Costs (5)	Other Expenses (6)	General Overhead (7)	Line No.
	General and Administrative Expenses							
33		RPM, 7-62, Sch. 1, Sheet 3, Sum of Lines 39 & 40 for Applicable Year	1970	$ 904,712	xxx	$ 261,746	$ 642,966	33
34			1971	938,200	xxx	272,978	665,222	34
35			1972	1,023,848	xxx	290,252	733,596	35
36			1973	1,080,448	xxx	303,340	777,108	36
7			1974	1,155,590	xxx	316,803	838,787	37
38	Total	Sum of Lines 33 thru 37		$5,126,018	xxx	$1,446,339	$3,677,679	38
39	5-Year Average	Line 38 divided by 5.0		$1,025,204	xxx	$ 289,268	$ 735,536	39
40	Percentage	Line 39, col. (6) & (7) divided by col. (4)		100.000%	xxx	28.227%	71.773%	40

1/ Computation of Percentages for use to Apportion Shop Buildings - Freight Cars and Depreciation Shop Buildings - Freight Cars Between Ownership Costs, Other Expenses, and General Overhead.

Line No.	Item (1)	Source (2)	Year 1970 (3)	1971 (4)	1972 (5)	1973 (6)	1974 (7)	Total (8)	5-Year Average (9)	Percent (10)	Line No.
1	Total Amount A/C 235 - Shops & Enginehouse Repairs	RPM, 9/, L. 1, col. (2)	$21,733	$25,276	$26,818	$29,824	$34,711	$138,362	$27,672	xxx	1
2	Portion of A/C 235 Applicable to Freight Cars	L. 1 x 29.592% (Per Diem Cost Study 1960, Worktable 9, Sheet 2, L. 33, Sum of cols. (5), (6), (7), & (8)	6,431	7,480	7,936	8,826	10,272	40,945	8,189	100.000%	2
	Apportion of A/C 235 Applicable to Freight Cars Apportioned on the Basis of Per Diem Cost Study - 1960, Worktable 9, Sheet 2, Line 33)										
3	Ownership Costs	L. 2 x 27.317% (Sum of cols. (5)&(7))	1,757	2,043	2,168	2,411	2,806	11,185	2,237	27.317%	3
4	Other Expenses	L. 2 x 72.014% (Sum of cols. (6), (8), & (9))	4,631	5,387	5,715	6,356	7,397	29,486	5,897	72.014%	4
5	General Overhead	L. 2 x .669%, (col. (10))	43	50	53	59	69	274	55	.669%	5
6	Total	Sum of L. 3, 4, & 5	6,431	7,480	7,936	8,826	10,272	40,945	8,189	100.000%	6
7	Total Amount A/C 266 (20) - Shops & Enginehouse Depreciation	RPM, 10/, L. 1, col. (2)	10,837	11,616	10,960	11,338	10,925	55,696	11,139	xxx	7
8	Portion of A/C 266 (20) - Applicable to Freight Cars	L. 7 x 28.841% (Per Diem Cost Study 1960, Worktable 9, Sheet 1, L. 17, col. (6))	3,123	3,350	3,163	3,270	3,156	16,062	3,212	100.000%	8
	Separation of A/C 266 (20) Applicable to Freight Cars Apportioned on the Basis of Percentages Developed in Table 1, Page 11 of the RPM (81.358% to Ownership and 18.642% to Other Costs)										
9	Ownership Costs	L. 8 x 81.358% - Ownership Costs	2,542	2,725	2,573	2,660	2,568	13,068	2,613	81.358%	9
10	Other Expenses	L. 8 x 18.642% - Other Expenses	581	625	590	610	588	2,994	599	18.642%	10
11	Total	Sum of L. 9 and 10	$ 3,123	$ 3,350	$ 3,163	$ 3,270	$ 3,156	$ 16,062	$ 3,212	100.000%	11

Work Sheet

Computation of Percentages to use to Distribute Transportation Expenses between ownership costs, other expenses, and general overhead to Schedule 1, Sheet 1
(Dollar Amounts in Thousands)

Line No.	Item (1)	Source (2)	1971 (3)	1972 (4)	1973 (5)	1974 (6)	Total (7)	4 Year Average (8)	Percentage (9)	Line No.
	Communication System Operation									
1	General Overhead	Rail Form H, Schedule 1, Sheet 2, line 32, col. (9)	$ 48,773	$ 52,369	$ 54,917	$ 57,827	$ 214,267	$ 53,317	.981%	1
	Train Supplies and Expenses									
2	Ownership Costs	Rail Form H, Schedule 1, Sheet 2, line 33, col. (3)	1,437	1,361	926	940	4,882	1,221	.023%	2
3	Other Expenses	Rail Form H, Schedule 1, Sheet 2, line 33, col. (7)	238,636	255,444	307,990	313,582	1,115,652	278,913	5.167%	3
	Superintendence, Stationery and Printing, Other Expenses, Insurance, Injuries to Persons									
4	Ownership Costs	Rail Form H, Schedule 1, Sheet 2, line 36, col. (3)	105	211	123	120	649	162	.003%	4
5	Other Expenses	Rail Form H, Schedule 1, Sheet 2, line 36, col. (7)	492,657	567,444	606,087	639,393	2,306,393	576,598	10.683%	5
6	General Overhead	Rail Form H, Schedule 1, Sheet 2, line 36, col. (9)	6,317	7,132	7,202	7,196	28,043	7,011	.130%	6
7	All Other Transportation Expenses (charge to other expenses)	Line 8 minus the sum of lines 1 thru 6	3,783,088	4,090,953	4,660,873	5,402,717	17,923,093	4,481,273	83.006%	7
8	Total Transportation Expenses	Rail Form H, Schedule 1, Sheet 2, line 38	$4,571,243	$4,933,237	$5,626,758	$6,441,763	$21,594,983	$5,398,746	100.000%	8

Summary	
Ownership Costs - line 2 plus line 4	.026%
Other Expenses - line 3 plus line 5 plus line 7	98.856%
General Overhead - line 1 plus line 6	1.121%
Total	100.000%

Work Sheet 3

Computation of Percentage of Expenses Not Applicable to Non-Revenue Freight
(Dollar Amounts in Thousands) - Insert in y/ to Schedule 1, line 3, col. (3)

Line No.	Year	Total Operating Expenses Charged to Other Expenses a/ (1)	Expenses not applicable to non-revenue freight b/ (2)	Line No.
1	1970	$10,[illegible]	$ 426,1[illegible]	1
2	1971	11,014,617	519,396	2
3	1972	11,673,726	512,010	3
4	1973	12,916,198	531,698	4
5	1974	14,000,733	610,566	5
6	Total	$60,[illegible],738	$2,660,[illegible]	6
7	5-year average	$12,160,731	$ 531,654	7
8	Percentage - Col. (2) divided by Col. (1)		4.388%	8

a/ Source: RPE, 7-61, Sch. 1, sh. 7, [illegible] line 4.
b/ Source: RPE, 7-62, Sch. 1, sh. 7, [illegible] line 5.

Computation of Active Per Diem Car Days and Per Diem Days Payable
(Car Days in Thousands, Other Statistics Whole Numbers)

Work Sheet

Line No.	Type of Car (1)	Cars Owned & Held Under Lease 1/ Dec. 31, 19__ (2)	Dec. 31, 19__ (3)	Average No. of Cars 2/ (4)	Per Diem Car Days 3/ (5)	Average No. of Bad Order Cars 4/ (6)	Bad Order Car Days 5/ (7)	Average No. of Surplus Cars 6/ (8)	Surplus Car Days 7/ (9)	Active Car Days 8/ (10)	Per Diem Days Payable 9/ (11)	Line No.
1	Box-Plain 40 Foot....................											1
2	Box-Plain 50 Foot and Longer........											2
3	Box-Equipped.........................											3
4	Gondola-Plain........................											4
5	Gondola-Equipped.....................											5
6	Hopper-Covered.......................											6
7	Hopper-Open Top-General Service.....											7
8	Hopper-Open Top-Special Service.....											8
9	Refrigerator-Mechanical..............											9
10	Refrigerator-Non-Mechanical..........											10
11	Flat-TOFC/COFC.......................											11
12	Flat-Multi-Level.....................											12
13	Flat-General Service.................											13
14	Flat-Other...........................											14
15	All Other Cars.......................											15
16	Total................................											16

1/ Source: Annual Report Schedule 417, cols. (b) and (c) to col. (2) above; cols. (h) and (i) to col. (3) above.
2/ Column (2) plus column (3) divided by 2.
3/ Column (4) multiplied by 365 days (366 in leap year).
4/ 12 month average, AAR Publication CS-6D-A
5/ Column (6) multiplied by 365 days (366 in leap year).
6/ 52 Week average, AAR Publication CS-6A
7/ Column (8) multiplied by 365 days (366 in leap year).
8/ Column (5) minus column (7) minus column (9).
9/ Column (10) multiplied by ratio of total foreign car days to active car days (shown in computation table below).

Computation of Ratio For Use in Calculating Per Diem Car Days Payable

	Item	Source	Amount	
1	Serviceable Foreign Cars - end of year preceding year.......	ICC Statement No. 100 12/31/		1
2	Serviceable Foreign Cars - end of year of study year........	ICC Statement No. 100 12/31/		2
3	Average number of serviceable Foreign Cars..................	Line 1 plus line 2 divided by 2.0		3
4	Active Foreign Car Days.....................................	Line 3 multiplied by 365 *		4
5	Total Foreign Cars - end of year preceding study year.......	ICC Statement No. 100 12/31/		5
6	Total Foreign Cars - end of year of study year..............	ICC Statement No. 100 12/31/		6
7	Average number of Foreign Cars..............................	Line 5 plus line 6 divided by 2.0		7
8	Total Foreign Car Days......................................	Line 7 multiplied by 365 *		8
9	Ratio - Total Foreign Car Days to Active Foreign Car Days..	Line 8 divided by line 4 (3 decimals)	**	9

* 366 days in leap year.
** Active per diem car days in col. (10) is multiplied by this ratio to produce Per Diem Days Payable in col. (11).

Formula for Calculating Cost of Capital and Cost of Capital Rate for use in Summary 4

Worksheet 5

Line No.	Item (1)	Source (2)	Line No.
	COST OF NEW DEBT		
1	Interest Rate on New Issues of Funded Debt	Transport Statistics in the U.S., Table 35	1
2	New issues of funded debt	Transport Statistics in the U.S., Table 35	2
3	Interest expense on new issues of funded debt	Line 2 multiplied by Line 1	3
4	Interest rate on new groupings obligations for conditional or deferred payment contracts	Transport Statistics in the U.S., Table 36	4
5	Amount of new equipment obligations for conditional or deferred payment contracts	Transport Statistics in the U.S., Table 36	5
6	Interest expense on equipment obligations for conditional or deferred payment contracts	Line 5 multiplied by line 4	6
7	Interest rate on new equipment obligations for other than conditional or deferred payment contracts	Transport Statistics in the U.S., Table 35	7
8	Amount of new equipment obligations for other than conditional or deferred payment contracts	Transport Statistics in the U.S., Table 35	8
9	Interest expense on equipment obligations for other than conditional or deferred payment contracts	Line 8 multiplied by Line 7	9
10	Total Interest on new debt	Sum of Lines 3, 6, and 9	10
11	Total amount of new debt	Sum of Lines 2, 5, and 8	11
12	Interest rate on new debt	Line 10 divided by Line 11	12
13	Market price factor	Footnote 1	13
14	After tax dividend yield rate	Moody's Transportation Manual, Common Stock dividend yield or similar publication	14
15	Pre-tax dividend yield rate		
15	Pre-tax dividend yield rate	Line 14 divided by (1 minus average effective tax rate for selected ten carrier group) 2/	15
16	Cost of equity common and retained earnings	Line 13 plus Line 15	16
17	Total shareholders equity (excluding preferred stock) ten carrier group	Transport Statistics in the U.S., Section A-1, General Balance sheet	17
18	After tax preferred dividends (par and non-par) ten carrier group	Transport Statistics in the U.S., Table 11	18
19	Pre-tax preferred dividends (par and non-par) ten carrier group	Line 18 divided by (1 minus average effective tax rate for selected ten carrier group) 2/	19
20	Total preferred stock - ten carrier group	Transport Statistics in the U.S., Section A-1, General Balance Sheet	20
21	Cost of equity - preferred - ten carrier group	Line 19 divided by Line 20	21
22	Cost of equity - ten carrier group	Line 16 x Line 17 plus Line 21 x Line 20 divided by Line 17 plus Line 20	22
23	Total amount of equity - railroad industry	Transport Statistics in the U.S., Table 2	23
24	Cost of capital	Line 12 x Line 11 plus Line 22 x Line 23 divided by Line 11 plus Line 23	24

1/ The mid-point between the high and low market price of common stock for each of the carriers making up the selected 10 road group is averaged to develop a composite market price of common stock. This procedure is repeated for ten years and the values for the ten years are trended by using least squares linear regression. From the trend line, a trended value for the beginning and ending years are calculated and average yearly rate of change is computed using compound interest calculations. If this value is negative, a zero will be substituted in lieu of the negative value.

2/ The effective tax rate is found by taking the actual federal income taxes paid by each road, totaling this value for each of the 10 roads and dividing this amount by the total net income before taxes for the 10 road group. (ATSF, BN, C&O, L&N, MOPAC, N&W, SCL, SOU, SP, AND UP.)

APPENDIX IV

Actuarial method used to determine service lives

The actuarial method is a statistical method of analyzing a large body of historical equipment property data as an aid in estimating average service lives for each type of freight train car. The actuarial method of life analysis has long been recognized by the utilities industry as an effective tool for life estimation. The freight train car data required for this method is collected and maintained by the Depreciation Branch. When complete records of aged data are available, actuarial methods can be used to obtain a survivor table for each car type and initial estimates of average service life.

Aged data contains records of annual installations and retirements for each vintage. The retirement ratio during the year is the ratio of retirements during the year to the exposures, or balance, at the start of the year. Since the age of each retirement is known, the average age of the retirements is easily determined. Generally it is assumed that all retirements occur at a constant rate during the interval and may be aged at the midpoint of the interval.

There are two distinct approaches to obtaining a survivor table from aged data. One method can be called "placement band analysis." A vintage (placement) band is specified. The retirement ratios for that vintage are calculated and used to create a survivor table. Here the history of one or more vintages is observed over a span of time. The second method can be called "experience band analysis." A specific series of observation years (experience band) is selected. All vintages are observed during the experience band years and the retirement ratio for each age as calculated.

These ratios are used to generate a survivor table. The history of the rate of retirement of property presented for all ages of property is the experience band. Neither the placement band nor the experience band need be limited to a single year and wider bands are often used. The exposures and retirements for each age interval are obtained by summation across the specified band. The wider band will tend to smooth the survivor curve since the retirement ratios are based on more observations than a single year would provide.

The percent of property surviving by age from the survivor table is plotted and then fitted with an Iowa Type Survivor Curve. An initial estimate of the dispersion and mean of the historical life experience is obtained for use in the judgmental process of determinig average service life for each car type grouping.

In the determination of service lives for each type of freight train car equipment for this proceeding, actuarial analyses of car types were performed on a national basis using all available data. The ultimate determination of service lives for each car type group was based upon analyst judgment. Criteria for judgment includes specific engineering and operating information concerning the nature and character of the property under review and observed experience.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its Office in Washington, D.C., on the 1st day of August 1977.

Ex Parte No. 334

CAR SERVICE COMPENSATION—BASIC PER DIEM CHARGES—FORMULA REVISION IN ACCORDANCE WITH THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976.

It appearing, That the Commission, by notice and order served November 11, 1976, instituted this rulemaking proceeding under authority of section 212 of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210) to establish a revised formula for the computation of basic per diem charges.

It further appearing, That all common carriers by railroad subject to part I of the Interstate Commerce Act were made respondents to this proceeding, and all interested parties were invited to participate.

And it further appearing, That the Commission, upon consideration of all the comments filed, has, on the date hereof, made and filed its report setting forth its conclusions, findings, reasons therefor, and its decision that the formula set forth in appendix III thereof should be adopted, which report is hereby referred to and made a part hereof:

Wherefore, and for good cause:

It is ordered, That the Commission hereby adopts the proposed car compensation formula as set forth in said appendix III.

It is further ordered, That this order shall become effective forthwith.

And its is further ordered, That this proceeding shall remain open so that refinements and modification of adopted procedures may be made where warranted.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

EX PARTE NO. 338

STANDARDS AND PROCEDURES FOR THE ESTABLISHMENT OF ADEQUATE RAILROAD REVENUE LEVELS

Decided January 31, 1978

Upon investigation and consideration of views, arguments, and representations of the parties participating in this proceeding, standards and procedures for the establishment of adequate railroad revenue levels adopted as Part 1109.25 of Title 49 of the Code of Federal Regulations.

Curtis H. Berg, Harry L. DeLung, Jr., Christopher C. DeMuth, Richard M. Freeman, Percy W. Johnston, Fritz R. Kahn, Richard W. Kienle, William C. Leiper, Charles N. Marshall, Thormund A. Miller, Charles C. Rettberg, Jr., C. Barry Schaefer, and *James L. Tapley* for railroads.

Kent Briggs, John I. Finsness, George H. Morin, Frederick C. Stewart, and *Robert J. Tosterud* for State governments and commissions.

Peter M. Shannon and *James R. Taylor* for Interstate Commerce Commission's Bureau of Investigations and Enforcement.

Constance L. Abrams, Linda Heller Kamm, and *William A. Kutzke* for United States Department of Transportation.

Jacob P. Billing, E. F. Bilz, Charles A. Brock, Robert L. Calhoun, Donald C. Cole, Richard B. Cortland, John F. Donelan, Kenneth R. Drottar, John S. Fessenden, Albert J. Francese, Donald A. Frederick, Eugene O. Gehl, John Guandolo, Robert R. Hanson, Sr., Richard J. Hardy, John E. Harvey, Van L. Hayes, Jr., S. J. Huddle, James J. Irlandi, William Jaudes, Donald V. Kane, William Q. Keenan, R. J. Kostack, Arthur D. Lewis, Dickson R. Loos, John K. Maser III, Charles J. McCarthy, Paul G. McQuiston, Charles A. Moran, Roy E. Olson, Judy Rea, Arthur von Rosenberg, Renee D. Rysdahl, David M. Schwartz, William L. Slover, William K. Smith, J. J. Stefanec, Roger J. Stroh, Paul J. Tierney, John P. Tucker, Jr., A. T. Udrys, Robert J. Wager, Kathryn L. Westman, Edwin M. Wheeler, G. A. Wilson, and *James D. Zakrajsheck* for shippers and other interested parties.

REPORT OF THE COMMISSION

BY THE COMMISSION:

In this report, we are adopting standards and procedures for determining and attaining adequate revenue levels for railroads. The action we take today was mandated be Congress in the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210) (4R Act). That act created the present section 15a(4) of the Interstate Commerce Act, which, as pertinent, provides as follows:

> With respect to common carriers by railroad, the Commission shall within 24 months after the date of enactment of this paragraph, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation, and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels.

It was for the purpose of promulgating the standards and procedures required by section 15a(4) that this rulemaking proceeding was instituted.

Our notice of proposed rulemaking was published in the Federal Register on March 16, 1977 (42 F.R. 14740). In that notice, reprinted as appendix A to this report, we contemplated that the need for revenue adequacy would be considered in those general rate increase cases where the carriers sought to improve their basic level of earnings. We observed that the need for revenue adequacy would be clearly relevant in such proceedings, and that much of the needed data would be in the record because of existing evidentiary requirements for general rate increase proceedings.

To determine whether revenue adequacy would exist, we proposed to consider three factors: (1) whether there would be a return on net investment equal to the carrier's cost of capital; (2) whether the carriers would have financial ratios indicative of a sound financial condition; and (3) whether the carriers would have a sufficient flow of funds to meet their capital spending requirements. We invited public comment not only on this specific proposal, but also on any other approaches that might be suitable for implemention of section 15a(4).

PROCEDURAL SETTING FOR THE ADEQUATE REVENUE LEVEL DETERMINATION

The notice of rulemaking proposed that the determination of adequate railroad revenue levels be made in those railroad general increase proceedings where an improvement in earnings levels (and not just the recoupment of recent cost increases) is sought. We reasoned that, by virtue of the data requirements promulgated in Ex Parte No. 290, ***Procedures Governing Rail General Increase Proc.***, 351 I.C.C. 544 (modified and corrected by subsequent orders), such proceedings afford a suitable record for determining revenue adequacy. Moreover, we felt that, where the carriers seek a general rate increase to improve their level of earnings, the analysis of revenue adequacy is clearly relevant.

Most parties indicate neither a preference for, nor an objection to, the proposed use of such general increase cases as the context for making the revenue adequacy determination. The few parties that discuss the power setting of the revenue adequacy determination, however, are generally in favor of a different procedure. The most detailed comments on the subject were submitted by the railroads. In essence, they favor having the revenue adequacy determination made in independent proceedings conducted at yearly intervals. In such proceedings, the Commission would determine a fair rate of return and the level of revenue that would be adequate under section 15a(4) for the following 12 months. The railroads contend that the making of these findings in independent proceedings would remove a cause of delay in general increase proceedings, and keep the Commission, the shipping public, and Congress aware on a continuing basis of the amount of any shortfall between actual and adequate revenues.

The U.S. Department of Transportation (DOT) also suggests that, each year, the Commission make general findings of revenue need, including rate of return, for the following year. Others favoring separate proceedings for the revenue adequacy determination are the United States Railway Association and General Mills.

Generally, objections by various parties to the railroads' proposal concern a lack of adequate opportunity for consideration of shipper views. These objections do not attack the basic concept of independent proceedings for revenue adequacy determinations.

The American Paper Institute prefers having the revenue adequacy determination made in actual rate proceedings. The

Institute fears that independent proceedings would appear deceptively unimportant to shippers, in the absence of an immediate issue as to reasonableness of rates. The approach ultimately favored by the Institute is similar to the one described in the notice of rulemaking, that is, that the revenue adequacy determination be made in the context of those general increase proceedings where improved levels of earnings are sought.

Discussion and conclusions.—Upon consideration of this matter in the light of the parties' comments, we conclude that it would be preferable for the determination of adequate revenue levels to be made in separate periodic proceedings conducted specifically for that purpose. This approach will permit the use of a regular and orderly procedure in which determinations are made on the basis of comparable data each year. This procedure also can be refined as experience is gained, and it will facilitate findings relevant to proceedings other than general rate increases. At the same time, it will avoid placing an undue emphasis on the use of the general rate increase as the means for attaining adequate revenue.

It is true that the use of independent proceedings may necessitate data requirements that somewhat overlap those now in effect for general rate increase proceedings. However, as discussed in a later section, we have endeavored to keep such overlap to a minimum, and shall seek ways of eliminating it as experience is gained with these proceedings.

Finally, we do not agree with the American Paper Institute that the use of separate proceedings for revenue adequacy determinations would necessarily prevent shippers from recognizing the importance of these determinations. But we will take special steps to assure that shippers are aware of the importance of these proceedings, by giving notice in the Federal Register and by issuing a press release at the inception of each proceeding.

CONSIDERATION OF THE REVENUE ADEQUACY FACTOR IN COMMISSION PROCEEDINGS

Section 15a(4) requires that the Commission devise standards and procedures for the "establishment" of adequate revenue levels. While much of the subsequent language in that section focuses attention on the criteria for determination of revenue adequacy, it is evident that more than a mere determination is contemplated. The term "establish" is stronger than other terms that could have been used, such as "define" or "determine," and conveys an element of bringing about a condition of revenue adequacy as well as of defining the condition. Moreover, section 15a(4) contains the additional statement that "[t]he Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels."

At the same time, section 101 of the 4R Act declares it to be the policy of that act, among other things, to "balance the needs of carriers, shippers, and the public." We construe the congressional view to be that the achievement of adequate revenue levels by the railroads would be in the best interest, not only of the carriers, but also of the shippers and the public. Indeed, many of the shippers who submitted comments in this proceeding expressed their support for the concept of railroad revenue adequacy. We agree with this view. The alternative to revenue adequacy for the railroads is deteriorating service or increasing reliance on public subsidy.

Nevertheless, it is clear that Congress did not intend for our mandate to be simply one of promoting railroad revenues. Considertation of shipper and public interests requires that revenue adequacy be taken not only as a goal but also as a limitation. In other words, to the extent possible, we are to assist the railroads in attaining revenue adequacy, and to protect the public from having to provide revenues that exceed an adequate level.

The question of when and how the Commission should assist in the attainment of adequate revenue levels was discussed by many of the parties. Consideration of the revenue adequacy factor in both general rate increase proceeding and in individual rate proceedings was discussed.

CONSIDERATION OF THE REVENUE ADEQUACY FACTOR IN GENERAL RATE INCREASE PROCEEDINGS

Several parties, including NITL and the National Council of Farmer Cooperatives, would deemphasize the role of the general increase as a means of promoting adequate revenues, and would place greater reliance on improved efficiency and technological advances. They do not indicate, however, that they would dispense with the general increase proceeding altogether. Most parties, in fact, seem to recognize a role of some type for the general rate increase in the railroads' attainment of revenue adequacy.

The notice of rulemaking observed that the revenue adequacy determination is clearly relevant in those general increase proceedings where an improvement in the level of earnings is sought. The Aluminum Association agrees and would limit application of revenue adequacy findings to such proceedings only. Somewhat similarly, the American Paper Institute would give consideration to revenue adequacy only in relatively infrequent revenue adjustment proceedings that are separate from cost-justified general increases.

The Water Transport Association, however, feels that consideration of revenue adequacy is necessary in cost recoupment cases as well as earnings improvement cases, because of the Commission's statutory obligation to assist the carriers in achieving adequate revenue levels. Similarly, the railroads, DOT, and General Mills believe that the revenue adequacy determination, having been made in an indepedent proceeding, should be considered wherever possible in rate proceedings. The Asphalt Roofing Manufacturing Association believes that proper scrutiny even of cost recoupment proposals requires consideration of overall revenue need.

If revenue adequacy findings are to be considered in judging the reasonableness of a proposed general increase, what weight should be given to such findings? The railroads take the position that, if their revenues are below an adequate level, this fact should have controlling weight in general increase proceedings. In other words, if the revenues anticipated from a proposed increase do not exceed an adequate revenue level, the Commission should permit the increase to become effective. A similar approach is suggested by DOT.

Most of the other parties, however, express strong reservations concerning the degree of rate freedom contemplated by the railroads. The Fertilizer Institute argues that limitations recognized in past cases are still applicable. It feels that, even though the carriers' revenues may be inadequate, their proposed increases must still be subject to requirements to preserve competitive relationships, avoid self-defeating traffic losses, and minimize adverse environmental effects.

Coca Cola would apply general increases selectively to bring all revenue contributions up to the variable cost level and, like a number of other shippers, would limit profits on the more remunerative traffic. The Upper Great Plains Transportation Institute would distribute increases selectively overall commodities in such a way as to tend to equalize cost/revenue ratios.

Several shippers, including the Southern Hardwood Traffic Association, Agrico Chemical Company, and Oxford Chemicals, would require improvements in operating efficiency as a precondition to rate increases. Indeed, the American Bakers Association would require that, for every dollar of a general increase to improve earnings, there be shown a dollar of additional savings from resulting economies and efficiencies.

The railroads would apply revenue adequacy findings to general increase cases on the basis of national composite figures. Similarly, the notice of rulemaking proposed to determine revenue adequacy only on a district and national basis. It observed that detailed findings of revenue need for individual carriers would be difficult to accomplish within the time constraints of a general increase proceeding. General Mills suggests, however, that such individual carrier findings would be possible in a separate adequate-revenue-level proceeding.

Another reason mentioned in the notice of rulemaking for using only district and national revenue adequacy findings is the argument that carriers within a district are in competition with one another and cannot implement rate increases of differing amounts. The Aluminum Assocation cautions that financial averages are distorted by the extraordinary weakness of some railroads. It suggests that, if the Commission attempts to bring the national average to an adequate level, some railroads will be permitted to operate inefficently.

The Southern Companies and others also urge that the differing needs of individual railroads be considered. DOT suggests that averages not be used to disregard the needs of weaker railroads, and that the latter be permitted greater rate increases than carriers whose earnings are more nearly adequate. The railroads, on the other hand, argue that, because of the interrelated nature of the rail transportation system, revenue level adjustments cannot be made on a single-carrier basis. They assert that the dispersion of earnings rates is wide in all competitive industries, and is inevitable in the railroad industry.

Discussion and conclusions.—We believe that the role of the general increase proceeding in the promotion of revenue adequacy should be deemphasized. Rates that are frequently readjusted by across-the-board percentage increases cease to be optimum rate levels for the individual services to which they apply.

Nevertheless, there are circumstances which cannot always be adequately dealt with by individual rate proceedings. In periods of rapid inflation, prompt across-the-board cost recoupment increases may be necessary to prevent dangerous deterioration in the railroads' financial condition. To bring the rate structure on a particular commodity to a more renumerative level without disrupting competitive relationships, it may be necessary to make an across-the-board adjustment affecting most or all movements of the commodity. Thus, there are circumstances where broad rate increases are necessary.

We no longer see a need to differentiate between cost recoupment proceedings and earnings improvement proceedings. Such a differentiation was made in the notice of rulemaking because we felt that proper attention could not be given to the determination of needed levels of basic earnings in emergency proceedings where recovery of inflationary cost increases is sought. We have now decided to make the determination of adequate revenue levels in a separate proceeding, independent of all general increase proceedings. According, a finding as to the level of basic revenue need will be available for consideration even in emergency proceedings, and there would be no reason not to take it into account.

We believe that, if the level of railroad revenue is inadequate, every means consistent with a just and reasonable rate structure should be used to help rectify this condition. The general increase, while having many undesirable features, is nevertheless the most direct means of affecting the overall revenue level of the Nation's railroads. We cannot afford to ignore opportunities for movement toward the goal of revenue adequacy that may present themselves in general increases. Therefore, revenue adequacy will be taken into account in such proceedings, and will be regarded as an important factor.

Nevertheless, while revenue adequacy is an important consideration in general increase proceedings, it cannot be the only consideration. General revenue adjustments can have important effects on numerous kinds of competitive relationships, and we must take care, as we have in the past, to avoid undue disruption of such relationships. We must also give effect to other legal requirements that may be applicable. Finally, we must recognize that rate increases which would result in self-defeating traffic losses are, in fact, contrary to the promotion of revenue adequacy and may warrant disapproval for that reason.

We agree with certain shippers that the revenue from every commodity should cover the costs incurred to transport it, and that there can be circumstances in which it is appropriate to limit the contribution obtainable from a profitable commodity. However, although equality of contribution may be desirable as an ideal, in an emergency or cost based generaly increase where revenue adequacy is lacking, it would be inappropriate to place undue emphasis on cost/rate ratios. Because of differing demand and competitive circumstances, a greater contribution is available from some commodities than from others. The possible adverse impact of general increases on particular commodities will of course be considered in general rate increases through evaluation of schedule C data required to be filed by the regulations adopted in Ex Parte No. 290.

Several shippers suggest that the approval of general rate increases be conditioned upon efficiency improvements by the Nation's railroads in general. While denial of a general increase on grounds of inefficient operations could perhaps have the effect of compelling corrective action, it could certainly also exacerbate operating problems. The problem of inefficiency is one that must be attacked on a broad front, including both adequate revenues for needed services and elimination of unneeded, unprofitable, and duplicative facilities. On a more specific level, inefficiency of an individual carrier's management may lend itself to consideration in certain circumstances, as will be discussed in a later section.

Finally, some of the parties object to having revenue adequacy considered only on a composite basis. As noted in the notice of rulemaking the nature of transportation competition limits the extent to which the differing needs of individual carriers can be recognized in making general rate adjustments. Nevertheless, in the context of an independent revenue adequacy proceeding, it will be feasible to make revenue adequacy determinations for individual carriers. We shall make such findings, and shall give them such weight in general increase proceedings as may appear appropriate in particular circumstances. As discussed below, these determinations would also be necessary to consider revenue adequacy in individual rate proceedings.

Consideration of the Revenue Adequacy Factor in Individual Rate Proceedings: Reasonableness of Rates

The railroads, and other parties as well, contend that a carrier's revenue adequacy status should be given weight in individual rate proceedings. It is the position of the railroads that the Commission must aggressively and consciously permit higher rates on individual movements whenever allowed by competition. Thus, they contend that a specific increase proposed by an individual railroad should be approved so long as that railroad's overall revenue does not exceed an adequate level.

DOT would accept a carrier's inadequacy of overall revenue as justification for approval of an individual rate yielding more than a proportionate contribution to overhead and capital cost. It would approve individual rate increases as necessary to move each carrier toward a position of revenue adequacy, and would disapprove rate increases for firms earning more than needed.

The Commission's Bureau of Investigations and Enforcement (BIE) speculates that rate/cost guidelines based on adequate-revenue-level findings could be used to determine how much of a carrier's revenue need should be borne by every commodity. The United States Railway Association, The Transportation Association of America, The Water Transport Association, and General Mills also agree with the general proposition that revenue adequacy findings should be applied in individual rate proceedings.

Most of these parties indicate that separate revenue adequacy determinations for individual carriers would be necessary. The railroads would apply the same fair rate of return to all roads, and would use this percentage to compute adequate revenue levels for individual carriers.

The Fertilizer Institute and the Aluminum Association believe that adequate revenues are only one factor to be considered in individual rate proceedings. The Western Coal Traffic League (WCTL) urges that rate comparisons and rate/cost ratios not be ignored in judging the reasonableness or individual rates. It argues that unfettered demand pricing of captive traffic would cause the eventual loss of such traffic or the cross-subsidization of other commodities. Several other parties express similar views and, like WCTL, would exclude consideration of adequate revenue level findings altogether in individual rate proceedings.

Discussion and conclusions.—Section 15a(4) places no limitation on the regulatory contexts in which revenue adequacy is to be given consideration. Indeed, the emphasis in the 4R Act on giving the carriers greater ratemaking freedom suggests a larger emphasis on the meeting of revenue needs through individual rate adjustments. We conclude that there is a need to encourage individual rate adjustments, as opposed to general rate increases, and that revenue adequacy should be a consideration in individual rate proceedings.

The setting of rates for individual services is complicated by the fact that a railroad incurs fixed or overhead costs from its general operations, in addition to the specific costs caused by the provision of the particular service. Thus, its rates cannot be set simply to cover the costs incurred in providing the particular service, but must be set at a higher level where possible to make a contribution to the coverage of fixed costs. A further complication is that fixed costs cannot be recovered in equal proportion from each service because demand and competitive factors place varying limits on the rates that can be maintained on different types of traffic. Thus, while the Commission is required to limit rates to levels that are just and reasonable, there is no simple formula that can be followed for doing so.

Where the reasonableness of a rate is questioned in an individual proceeding, we consider, among other things, cost evidence, comparative rate evidence, and circumstances relating to demand and competition. The effect of section 15a(4), we believe, is to require that revenue adequacy also be given explicit consideration in these proceedings. In order to facilitate such consideration, we shall make findings in our periodic independent proceedings as to the adequacy of the overall revenue level of each class I carrier. In individual proceedings, then, the revenue adequacy status of each proponent carrier can be taken into consideration.

A proponent carrier's revenue adequacy status can and should influence the determination as to how high its rate for a particular service may reasonably be set. Where the traffic in question can make a valuable revenue contribution, the fact that the carrier's revenue is less than adequate should certainly be taken into consideration, both in formal proceedings and at the suspension level. Revenue adequacy is only one factor to be considered, and does not supersede other pertinent aspects of the reasonableness determination. Nevertheless, it is an important factor and shall be given the maximum effect possible. Where the rate is one proposed by carriers which have demonstrated revenue need, we will exercise greater restraint in using our suspension powers. For example, despite the 160 percent rate/variable cost figure developed as the general benchmark in Ex Parte No. 320, we would not ordinarily suspend a rate increase proposed by a carrier with revenue need, unless the resulting rate/variable cost relationship were to exceed 180 percent. In this way, our disposition of individual rate proceedings shall assist in the attainment of adequate revenue levels.

CONSIDERATION OF THE REVENUE ADEQUACY FACTOR IN INDIVIDUAL RATE PROCEEDINGS: SPECIFIC SERVICE COSTS

Some parties discussed another way in which section 15a(4) might be applied to individual rate cases. The variable cost level, which generally serves as the minimum reasonable rate level, includes a component for variable capital cost. In computing this component, it is the Commission's present practice to base the percentage cost of capital strictly on embedded interest rates. The railroads argue, however, that this practice ignores the higher cost of equity capital, and does not assure sufficient revenue to enable the attraction and retention of equity capital, as required by section 15a(4). Thus, they urge that the higher cost of equity capital be recognized in the computation of variable capital cost.

The Public Utility Commissioner of Oregon agrees, and would modify the Cost and Valuation Section's Rail Form A to include the full cost of equity capital. In contrast, WCTL feels that the cost of equity capital cannot be determined exactly, and that the percentage cost of capital in variable cost should continue to be based on the embedded cost of debt. The United Fresh Fruit and Vegetable Association also opposes an increase in the computed variable cost of capital, fearing that resulting rate increases might prevent the movement of traffic such as perishable commodities.

In a slightly different vein, BIE states that one means of implementing section 15a(4) is the improvement of capital cost measures for individual movements. In particular, it would seek more accurate measurement of the value of equipment required for particular traffic. It would include the amount of equipment time consumed by the traffic in question, and the cost responsibility of peak-period traffic. The National Industrial Traffic League (NITL), WCTL, and Coco Cola, however, feel that calculation of a rate base and rate of return on individual movements would be virtually impossible, or at least beyond present capabilities. The railroads agree generally, although they feel that this calculation can be done in instances where the facilities involved are devoted exclusively to the provision of a single service.

Discussion and conclusions.—The determination of the level of cost created by an individual service is a complex subject, and one which warrants fuller consideration than we can give it in this proceeding. The Section of Cost and Valuation of our Bureau of Accounts is revising the Commission's cost methodology to make use of the new Uniform System of Accounts for Railroads promulgated in No. 36367, ***Revision to the Uniform System of Accounts for Railroads*** (published July 7, 1977, at 42 F.R. 35016). It has been assisted by accounting consultants Haskins and Sells and Peat, Marwick, Mitchell and Co., and has conducted open meetings for discussion of the consultants' recommendations. One of the questions being addressed is whether the cost of equity capital included in variable cost should be determined on a basis other than embedded interest rates. In addition, we are preparing to review the Commission's definition of cost terms set forth in docket No. 34013, ***Rules to Govern Assembling & Presenting Cost Evidence***, 337 I.C.C. 298 (1970). As part of that analysis we will review, among other things, the cost definitions recommended by the consultants.

Because these matters are being evaluated in another context, we will not further discuss them here. We will observe, however, that the correct determination of the cost created by an individual service is fundamental to the attainment of revenue adequacy. Failure to correctly identify this cost level can result in the forfeiting of potentially remunerative traffic, on the one hand, or, on the other hand, in the provision of service at noncompensatory rates.

This concludes our consideration of the significance of the revenue adequacy factor in Commission proceedings. Now that we have identified how revenue adequacy findings are to be used, we turn to a discussion of the proper elements for those findings.

CRITERIA FOR THE ADEQUATE REVENUE LEVEL DETERMINATION

The notice of rulemaking proposed that the adequacy of railroad revenues would be determined upon consideration of: (1) whether such revenues provide a return on net investment equal to the carriers' cost of capital; (2) whether such revenues enable the carriers to maintain financial ratios indicative of a sound financial condition; and (3) whether such revenues make possible a sufficient flow of funds to allow the carriers' needs for funds to be met.

In their statements of comment, some parties indicate that rate of return should be the primary measure of adequate revenue levels, with funds flow analysis serving a supplemental function. Several others consider funds flow analysis to be a sufficient measure of adequate revenue levels in itself, or would consign rate of return to a subordinate role. Still others would give preference to neither criterion. Several would take financial ratios (other than return on investment) into account, but not as the principal determinant.

Parties seeing a central role for a return on investment standard include the railroads, the United States Railway Association, DOT, and Arthur Andersen & Co., as well as several other parties whose comments on subordinate issues imply the use of a return on investment standard. In general, these parties feel that a return on investment equal to the carriers' composite cost of debt and equity capital would allow the carriers to meet their interest obligations and to attract equity capital on reasonable terms, as required by section 15a(4).

The railroads and DOT see the role of funds flow analysis primarily as a means of projecting whether financial health will result from actions to promote a fair return on investment. The railroads favor annual publication of funds flow model results as a staff study, to be drawn upon by parties for whatever purposes are appropriate. They urge, however, that the present proceeding not be delayed while numerous refinements to the model are being considered.

Three of the parties—the Water Transport Association, WCTL, and BIE—favor primary reliance on funds flow analysis as a determinant of adequate revenue levels. The essence of their position is that railroad revenues should be considered adequate if the railroads are able to raise sufficient funds to cover their needs for capital expenditures. If the railroads can raise such funds without resort to equity markets, by using depreciation, retained earnings, and borrowed funds, then these parties would consider a return sustantially below the composite cost of capital rate to be adequate. As an example, WCTL cites with approval the 6-percent average return on investment of the Southern Railway.

The witness for BIE sees a role for fair return on investment, as well as for funds flow analysis. He explains that he would consider revenues "adequate" if they meet the level shown needed by funds flow analysis; and that he would consider revenues "excessive" if they exceed a fair return on investment.

Some parties, such as NITL and Archer Daniels Midland, suggest that the Commission consider both return on investment and funds flow, as well as other financial ratios, without placing sole reliance on any one standard. Coco Cola opposes use of a specific rate of return as a standard. General Mills states that it opposes fair return as the dominant standard, but nevertheless indicates that the carriers' return should cover their capital costs.

None of the parties considered financial ratios (other than return on investment) to be of principal importance, although several, including the railroads, DOT, BIE, and NITL, felt that such ratios should be considered. Few parties commented on the weight to be given to return on shareholders' equity, as compared to return on net investment. The railroads and NITL would give it little weight, while DOT would consider it together with return on investment. BIE would consider it together with return on investment in conjunction with the use of the funds flow model.

Discussion and conclusions.—In the notice of rulemaking, we proposed essentially that the adequate composite revenue figure would be derived upon consideration of several factors, without stating which factor, if any, would predominate. The comments reveal much disagreement as to the criteria that should be emphasized. We are unable to conclude, even now, that one measure of revenue adequacy should be relied upon to the exclusion of others.

An important measurement is the rate of return on net investment. It relies on the accounting records maintained pursuant to Commission requirements, to provide a traditional measure of the profitability of the carriers' investment. We continue to believe that a return on net investment equal to the carriers' cost of capital is one quantity to be considered in determining revenue adequacy. The cost of capital is generally considered an acceptable measure of a fair return on the capital invested. In addition, it indicates the rate of return that is conducive to the retention and attraction of capital. (Issues related to the composition of the rate base, measurement of income, and determination of the cost of capital will be discussed in a later section of this report.)

Nevertheless, as explained in the next section, there are reasons that we cannot place sole reliance on this measure. It provides a useful point of reference, in that it tends to show what the carriers' rate of return should be on the capital invested in transportation facilities, if the carriers' investment were altogether well-suited to current transportation needs. However, because the investment base is not, and probably cannot be, stated only in terms of the optimum type and amount of facilitites, a full cost of capital return on that base is not a proper minimum requirement for revenue adequacy. On the other hand, such a rate of return would ordinarily represent the maximum average return that could be allowed, because nothing more would be required either to provide a fair return on the capital actually invested, or to enable the carrier to attract new capital.

There is, then, a need for additional means of evaluating revenue adequacy. Since the concern of section 15a(4) is with the sufficiency of revenue to enable needed capital investment, rate of return analysis should be supplemented with a direct examination of the railroads' ability to raise needed capital. There are financial indicators of the carriers' ability to support capital spending. Of great importance would be indicators of their ability to borrow needed funds. These would include financial ratios such as those showing fixed charge coverage and the proportion of debt in their capital structure. Their ability to retain and attract equity capital would be shown to some extent by the return on net investment, the return on shareholders' equity, and the ratio of the market value of common stock to its book value. Experience in analyzing these indicators will reveal whether standard guideline figures for particular ratios should be adopted. These indicators of ability to raise capital, however, do not in themselves show the extent to which revenue may fall short of the amount needed.

It was the desire to find a direct means for measuring revenue need that prompted the development of the funds flow model in Ex Parte No. 271. The procedure embodied in this model is to project the needed capital outlays and other fund requirements of the railroads, to determine the amount of funds available to them from operations and capital sources, and to ascertain the amount by which the available funds would fall short of the projected requirements. The dollar amount of this shortfall is added to the projected revenue level to find the amount of revenue needed. For ease of application, this needed revenue amount can be translated into a percentage return on net investment.

In determining composite revenue need, we shall take the projections of the funds flow model into consideration. Such projections will be entered into the record in the independent revenue adequacy proceeding, so that they can be reviewed and commented upon by the parties to the proceeding. Any modifications of the projections that may be suggested by the parties will be given consideration. In addition, railroad revenue need projections from other sources, if submitted in evidence, will also be taken into account. We recognize that much work remains to be done in the refinement of the model. Nevertheless, we believe that its projections, when subjected to proper scrutiny, can be balanced against rate of return findings and other pertinent evidence to show the level of composite revenue adequacy for the Nation's railroads.

How these various measures will come together to show a particular revenue level will depend upon the figures they indicate individually and upon the reasons for differences in those figures. Not only will they vary from one another because of the differing approaches, but these relative differences are also likely to change with economic conditions, and even with the state of refinement of methodology. The funds flow approach, in particular, is in a developmental stage. Its results can be expected to merit increasing acceptance in future years, as its methodology is refined.

With respect to evidentiary requirements, we note that some of those promulgated for general increase proceedings in Ex Parte No. 290 are also pertinent to the task of the independent revenue adequacy proceeding. We have no desire to impose similar requirements for the independent proceeding without relieving the evidentiary burden for general increase proceedings. On the other hand, we question whether sufficient up-to-date information would be available in the general increase proceedings, if the Ex Parte No. 290 type of data were presented only in the independent proceeding. The whole concept of an independent revenue adequacy proceeding is unfamiliar in our practice. Therefore, we shall move slowly in transferring to it the evidentiary requirements that have evolved for general increase proceedings.

As a point of beginning, we shall adopt the following evidentiary suggestion of the railroads:

The railroads would prepare and file each June 30:

> 1. An Ex Parte 290-type schedule A. The 3 most recent full calendar years would be filed in 1978, and succeeding calendar years would be added each subsequent June 30.
> 2. Ex Parte 290 schedules I and J (and affiliate data) (as to latter see 49 CFR 1102.6).
> 3. A cost of capital study.
> 4. A fair rate of return analysis on a national basis.
> 5. A statement or adequate revenue levels based on
>
> (i) traffic volume and expenses in the prior calendar year;
> (ii) estimated traffic volume and expenses for the current year.

Schedule A calls for selected financial ratios and related data for the national composite as well as for districts and for individual railroads. Schedule I requires statements of changes in financial position for the same report units, while schedule J is for data on payments to affiliates by national and district composites. Section 1102.6 requires other data on transactions with affiliates. All three schedules, as well as the affiliate transaction requirement, call for data on a calendar-year basis. Schedules A and J also require data for the latest four-quarter period.

We shall have the calendar year data reported in the revenue adequacy proceeding. For the first such proceeding, data for schedules A, I, and J, and the affiliate transaction data, will be based on the preceding 3 calendar years. To avoid duplication of effort in subsequent years, only the most recent calendar year data would then be submitted. Notice will be taken of earlier adequate revenue level proceedings so that trends can be observed. In addition, schedule J will be modified to require data for individual class I carriers, since this information will be needed in the determination of individual carrier revenue adequacy.

In general increase proceedings, the carriers will not be required to resubmit data which had previously been submitted in the most recent adequate revenue level proceeding. Instead, the carriers will be required to update schedules A and J data to the base period (year)-actual, which has been defined as the "four-quarter period ending no later than 4 months prior to the filing date of the proposed increase." This will provide the Commission and the parties with the most recent data available upon which to judge the merits of the increase and will not unduly burden the carriers since they will have only to update the data from the most recent revenue adequacy proceeding. Schedule I and the affiliate transaction data will not be required to be updated since they are presently based on calendar year data in Ex Parte No. 290. However, if there are significant changes in the carriers' financial position in these areas, the Commission reserves the right to require this information to be updated as part of the carriers' evidentiary presentation in a general increase proceeding.

In short, the same total filing requirements in these schedules will be continued, but the calendar-year data will now be filed in the revenue adequacy proceeding. Only the updated four-quarter-period data will be filed in general increase proceedings. (The necessary conforming changes in the Ex Parte No. 290 regulations will be promulgated after a data filing has been made for the first revenue adequacy proceeding.)

For the present, the remaining Ex Parte No. 290 requirements, consisting largely of cost data and related statistics, will continue to apply in general rate increase proceedings. Practical experience with these requirements and with the revenue adequacy proceeding will enable us to define areas where further modification can be made to minimize the burden on the carriers, while assuring that the needed data is provided in the appropriate context.

By the same date that the railroads submit their evidence (on or before June 30), our staff will publish its funds flow projections, using annual report data and the other sources relied on in the model. By July 30, other interested parties may file their reply statements, including comments on the funds flow projections. By August 20, the railroads may file rebuttal to the reply statements, along with their own comments on the funds flow projections. Upon consideration of the data filed, we will prepare a report containing our conclusions on the question of revenue adequacy, for issuance on or before October 30.

Because we will be considering cost of capital studies in the revenue adequacy proceeding and making cost of capital findings for that purpose, we will also be able, with little additional effort, to use this proceeding to establish the cost of capital data that may be required in other Commission proceedings. Accordingly, our regulations will provide for evidence and findings on the four aspects of cost of capital that may be of interest in one or another context: cost of embedded debt, cost of new debt, cost of equity capital according to market value studies, and cost of equity capital according to comparable earnings studies. The findings that we issue will deal both with revenue adequacy and with general cost of capital data.

Thus far, we have dealt only with the determination of revenue adequacy on a composite basis. Nonetheless, if revenue adequacy is to be considered in individual rate proceedings, findings will also be necessary for individual carriers.

In the case of individual carriers, it is sufficient simply to determine whether existing revenue is adequate or inadequate, without attempting to specify the dollar amount of an adequate revenue level for each carrier. The making of revenue adequacy findings for individual carriers is a matter for which we can develop the best procedures only with the benefit of practical experience. Initially, we shall keep our evidentiary requirements to a minimum, although allowing such additional evidence to be submitted as the parties may deem pertinent.

We have already noted that the Ex Parte No. 290 schedule A data will be filed in the revenue adequacy proceeding. Such data will provide a basis for judging the individual carrier's financial ability to raise needed capital. In particular, such items as the capital structure ratio, the fixed charge coverage, and rates of return on net investment and on shareholder's equity, will shed light on this question. In addition, we shall require evidence of each carrier's bond ratings, which are a direct indication of its credit in capital markets.

In the future, we shall give consideration to additional requirements for evidence bearing on individual carrier revenue adequacy. The carriers' ability to make needed investment would tend to be shown by the degree to which they are actually investing. Thus, there may be value in considering data on deferred maintenance and on capital spending. Reports on these subjects are being filed pursuant to a condition imposed in Ex Parte No. 305, *Nationwide Increase of Ten Percent in Freight Rates and Charges, 1974* (order served June 4, 1974 and amended or modified by subsequent orders). However, there may be a need for closer examination of definitions for the concepts involved in order to achieve the maximum usefulness of this type of data.

We note that a rulemaking proceeding has already been instituted to promulgate requirements for the reporting of track maintenance, in No. 36557, *Reporting Railroad Track Maintenance* (notice served July 5, 1977; 42 F.R. 32819). The reports contemplated in that proceeding are intended to be helpful for analyzing the adequacy of track maintenance, and would provide a separation of data by main and branch lines. As data of this type becomes available, we shall consider its inclusion in the evidence upon which revenue adequacy determinations for individual carriers are based.

HONEST, ECONOMICAL, AND EFFICIENT MANAGEMENT

A discussion of the criteria for determining revenue adequacy would not be complete without consideration of the need for honest, economical, and efficient management. The revenue adequacy contemplated by section 15a(4) is that which exists under these conditions.

Certain shippers contend that inefficient operations contribute toward the diminution of railroad revenue, and urge that these conditions be corrected before shippers are asked to pay increased rates. NITL asserts that the Commission should establish a standard of "honest, economical and efficient management" to be applied in section 15a(4) proceedings. Several other shippers support the establishment of such standards.

A predominant view among the shippers is that the carriers cannot look to rate increases alone to enhance their earnings, but must improve their efficiency and productivity. While they urge the adoption of specific requirements concerning honest, economical, and efficient management, most do not offer specific suggestions as to the content of such requirements. The American Paper Institute, however, urges the Commission to establish procedures for monitoring railroad productivity. It would require that, when the carriers seek general rate increases to improve earnings, they specify their expectations concerning productivity. It would then conduct a followup study of the degree to which expenditures actually contribute to improved productivity, and would consider the results of this study in evaluating subsequent rate increases.

The railroads acknowledge that the standard of honest, economical, and efficient management must underlie the revenue adequacy determination. They do not believe that this factor can be quantified, and contend that establishing specific procedures concerning this standard would be impractical.

Discussion and conclusions.—Many shippers view management efficiency as an important means in itself for improving revenue adequacy. The desirability of improving railroad productivity has been noted for some time. We agree with this viewpoint. An important aspect of management efficiency would be the utilization of opportunities provided by the 4R Act for eliminating unnecessary costs and for modernizing rates. Legitimate railroad abandonments, as well as appropriate mergers and consolidations can be as important in improving revenues as rate adjustments. We encourage the carriers to make use of the opportunities provided by the 4R Act. As we consider such proposals, while we must bear in mind all aspects of the public interest, one important aspect will be the carriers' need for revenue adequacy.

Of particular conern in the present proceeding is whether specific requirements or procedures on the subject of management efficiency are feasible. The comments of shippers indicate that carrier efficiency is a widespread concern among users of rail transportation and that the development of better means to monitor and encourage it would be welcomed by them. We indicated in the notice of rulemaking that efficiency is a matter that may not be susceptible of quantification. We do not, however, rule out the possibility that useful indixes of efficient operations could be developed.

On a composite level, efficiency might be judged to a limited extent by statistics on productivity and by financial ratios indicative of profitability. A more meaningful appraisal may be possible on the individual carrier level. Should the circumstances warrant it, investigation of a particular carrier's operations might extend so far as to include fiscal and management audits.

A matter related somewhat to efficiency is service quality. In appropriate circumstances, performance standards can be prescribed, as they were in Ex Parte No. 284, ***Need for Defining Reasonable Dispatch***, 355 I.C.C. 162.

The problem remains of translating findings on the quality of management into practical consequences for regulatory policy. One method that suggests itself in the present context is to consider the existence of inefficient management as the basis for a finding of constructive revenue adequacy. The result would be that the affected carrier would receive no special recognition of revenue need in rate proceedings.

Our conclusions at this time are of a tentative nature. On the whole, we do not believe that satisfactory specific means for dealing with the question of efficiency have been presented on the present record. The matter is an important as well as difficult one, however, and shall have our continuing attention. We will investigate the feasibility of establishing standards for honest, efficient, and economical management.

NONCOMPENSATORY SERVICES

Another factor that deserves attention in the determination of revenue adequacy is the extent to which the carriers are performing services at noncompensatory rate levels. Several shippers have alleged that significant volumes of rail traffic move at or below the variable cost level. The railroads, in their reply, state that while inflation and regulatory delay may have caused some marginally compensatory rates to fall below variable cost levels, the railroads "have been extremely active in attempting to correct the existence of noncompensatory rates."

Whatever the extent of and reasons for the maintenance of noncompensatory rates, evidence exists which indicates that this is an area which deserves further attention. A study performed for the Commission by A. T. Kearney, Inc., in support of the Commission's evaluation of the 4R Act, indicated that significant percentages of both interstate and intrastate traffic move at noncompensatory rates. We take official notice of that study.

The analysis in the Kearney report relies on a burden study based on formula methods of cost estimation. A proper resolution of this question would require a close examination of the costs of individual services, based on reliable cost evidence of the most specific kind available. The existing evidence is sufficient, however, to narrow the scope of the inquiry to those commodities and movements where rates do not appear to cover variable costs.

The Commission will give this issue further consideration. Basic economics tells us that providing a service which does not cover its costs cannot be justified, except in limited circumstances such as providing promotions. Fairness to the ratepayers which bear more than their proportionate share of the costs of the rail system dictates that we resolve the questions raised by the parties in this proceeding and by the burden study. The timing and scope of this initiative will be determined after further study.

We have discussed in general the criteria to be considered in the revenue adequacy determination. We have not given a controlling role to rate of return on net investment as the determinant of revenue adequacy for the reasons set forth more fully in the following section. As pointed out by the Coordinator, rate of return has never been used as a sole criterion[1] of revenue need. We will continue to accord it great importance, supplementing its use with other financial measures. With respect to funds flow analysis, we have recognized that much work remains to be done to enhance the acceptability of projections made by the Ex Parte No. 271 model. This work shall be undertaken, and the advice of interested parties will be publicly solicited.

There remains for consideration a further examination of the rate of return standard. We shall discuss in more detail the reasons that it cannot be relied upon as a sole measure of revenue adequacy. Finally, we shall take up the specific questions which have arisen concerning the computation of the rate base, the measurement of income, and the determination of the cost of capital.

THE QUESTION OF SOLE RELIANCE ON A RATE OF RETURN STANDARD

In both Ex Parte No. 271 and this proceeding, the railroads have argued for the adoption of a fair return standard for the determination of adequate revenues. As proposed by the railroads, the Commission would make an annual determination of the railroads' revenue requirements after submission of the most current annual operating results by the carriers. Under this procedure, the Commission would calculate adequate revenues as the sum of the past calendar year's operating expenses, depreciation, interest and taxes plus a level of net earnings calculated to provide a predetermined percentage yield on the book value of railroad investment. A substantial portion of the railroads' testimony in Ex Parte No. 271 and in this proceeding is devoted to a discussion of the methodology of determining the percentage rate of return. The railroads' witness, J. Rhoads Foster, explains this methodology for setting the percentage yield on book investment, and contends that this approach is consistent with the criteria established under section 15a(4).

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[1] For a history of the revenue standards used by the Commission, see Ex Parte No. 271, *supra*, at pp. 1543-1565.

Initially, we take note of Dr. Foster's belief that "the capital bubgeting principles which guide unregulated firms have a limited relevance for investment decision-making by regulated companies." As he describes these capital budgeting principles, companies will make investments which promise to yield sufficient revenues in future periods to cover all outlays and to provide an expected rate of return at least equal to the cost of capital. The relevant rate of return relates to the prospective net revenues expected over the investment's life, rather than accounting profits charged to a particular period. In general, expected rates of return on alternative investment opportunities will vary over a wide range. Management should determine its capital budget by ranking investments according to their expected rates of return and undertake every project with a rate of return in excess of its cost of capital. By expanding its total investments in this fashion, a company will maximize the value of its share price of common stock when the rate of return on the last dollar invested, the *incremental* rate of return on new investment is equal to the incremental cost of capital.

The expected rate of return on new investments and the minimum return required by creditors and investors are relevant only prior to the commitment of capital funds. Once the investment is undertaken and funds committed, the realized rate of return on committed investments may be quite different than anticipated. For uncommitted funds, the relevant cost of capital is the prospective rate of return that investors and creditors can obtain by applying their funds elsewhere. Thus, Dr. Foster indicates that propsective returns on the market value of equity capital guide investment and financing decisions, rather than realized (accounting) returns on book value investment:

> A company, whether regulated or unregulated, can attract capital regardless of whether its earnings are equal to the past or current cost of the capital already employed. Needed capital may be obtained by means of contractual arrangements, if the protection afforded creditors is sufficiently rigorous, so that a major share of the risk is borne by the company and its shareholders. The company can sell common shares at a price when necessary, even though earnings are far below what the existing equity capital would have earned if it had been invested in some other enterprise of corresponding risk ***. New investors will buy additional shares, committing dollars of current purchasing power, if per-share prices are at the level where prospective per-share earnings are satisfactory to the purchaser. For example, scores of electric utilities sold common shares in 1974 and 1975 at prices below book equity. The market values of outstanding shares of electric utilities were about one-half the 1965 level, and these values were further diluted by the sales of additional shares at prices far below book equity. Thus, the ability of a firm to attract new capital, although it is not earning a fair return on old capital, does not mean that investors are committing new capital at a price below their opportunity cost. Verified statement 1(B), Supplement I, pp. 9-10.

Dr. Foster contends that these principles of economies and finance have a "limited relevance" for investment and financing decisions by regulated firms. It is his interpretation of railroad regulation that railroads—like public utilities—are obligated to finance and construct such plant as may be needed irrespective of its expected return or profitability:

> Regulated industries are obligated to supply safe and adequate service to all who apply. They are obligated to make additional capital expeditures without regard for whether prospective returns are equal to the opportunity cost of the capital. They do not have the same freedom as unregulated firms to adjust financial decisions to poor earnings, adverse market conditions, or the impact of inflation. Stated otherwise, the capital budgeting principles which guide unregulated firms have a limited relevance for investment decision-making by regulated companies.
>
> The corollary of the obligation to provide service upon demand is a right of opportunity to earn a fair return. Verified statement 1(B), Supplement I, pp. 10-11.
>
> A railroad is obliged to transport all types of commodities offered. It is not able to select the most profitable operations. Managers of railroads and other regulated enterprises are obligated to make expenditures without regard for earnings which might be available from some alternative use of capital. They find it necessary to acquire and construct facilities in order to provide service upon demand, both on-peak and off-peak, to attract traffic and increase revenues, to minimize operating expenses, and to protect existing fixed investments. Verified statement 1(B), Supplement I, p. 17.

If railroads are required to provide new capacity without regard to projected profits at existing rates, then railroads must be guaranteed the opportunity to recover their invested capital plus a fair return. According to Dr. Foster:

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> The problem is to determine that rate of return on book common equity which is fair and reasonable for historical, "sunk" investment. Verified statement I(B), Supplement I, p. 8.

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> Thus, we are again concerned with the different purposes for which the "economic profit or return" may be determined. The current cost rate is correct as the guideline for capital budget decisions, and whenever the purpose is to measure the cost of new capital. However, for the purpose of defining the revenue level objective, the appropriate standard is the rate of return being realized by other enterprises of corresponding risk, expressed as a percentage of book common equity instead of market price or value. Such a rate of return is by definition applicable to an original cost or net investment rate base. It is the rate of return on book common equity which is fair and reasonable for historical "sunk" investment. The economic rationale is the opportunity cost of captial principle, which holds that investors expect the capital they commit to an enterprise to earn a return commensurate with returns available from alternative opportunities of generally similar risk. Because the rate base is frozen at original cost, the same "causes, forces, movements and conditions" which otherwise would determine the rate base are necessarily to be considered in determining the economic profit or return. Verified statement I(B), Supplement I, p. 13.

Dr. Foster contends, therefore, that considerations of fairness cannot be separated from the willingness of new investors to commit capital to the railroads, and that new investors will consider the impact of unfair past regulation in formulating their own expectations of prospective returns from the commitment of new capital.

With respect to competitive industries subject to regulation, Dr. Foster also contends that "an industry-wide basis for determination of the cost of capital and fair rate of return is consistent with the opportunity cost principle." As support for this statement, Dr. Foster offers a further explanation in a footnote in his verified statement:

> For similar reasons, rate regulation of other competitive industries is on a group or area basis instead of a separate company basis. National gas producers: ***Area Rate Proceeding***, Docket No. AR61-1, 34 FPC 159 (August 5, 1965). Stockyard marketing agencies: ***Tagg Bros.*** v. ***United States***, 280 US 420 (1930). International Telegraph common carriers: ***Postal Telegraph-Cable Co. et al.***, 5 FCC 524 (1938). Airlines: ***General Passenger-Fare Investigation***, Docket 8008 ***et al.***, 32 CAB 291 (November 25, 1960).

Thus, Dr. Foster argues that in competitive industries, firms will vary in exposure to risk and, consequently, to individual company cost of capital, and that "it is the cost of capital to railroad companies of relatively superior financial integrity which is appropriate for rate-making and earnings regulation, not the higher capital costs of railroads with relatively inferior credit." Verified statement 1(B), Supplement I, p. 14.

As further elaborated by Dr. Foster, railroads having high costs of capital will be motivated to undertake investments which exceed their cost of capital as long as the overall fair return is not reached. Thus, as profitable investment projects are undertaken and a carrier's earnings improve, its cost of capital will fall to the level selected as the fair return:

> Certainly every carrier should be given the fullest possible opportunity to develop its markets to the level where revenue is adequate to meet costs of service, including the cost of capital to the individual carrier. This does not mean that the cost of capital to the individual carrier is the criterion for ratemaking. Moreover, if a carrier of relatively inferior credit were to achieve its goals, its cost of capital would then be at the level experienced by carriers of superior credit. Verified statement 1(B), Supplement I, footnote 2, p. 15.

Finally, Dr. Foster admits that the fair rate of return standard is an objective and not a guarantee for regulated industries. He notes that realized returns on book equity of domestic trucklines regulated by the Civil Aeronautics Board have been far below the returns allowed over the period 1970-1975, and that realized returns of electric utilities have also been below allowed returns. For the railroad industry, competitive conditions will limit the attainment of a fair rate of return for the foreseeable future.

Discussion and conclusions.—As noted by Dr. Foster and others,[2] the cost of capital is generally associated with the prospective cost of new investment. In general, it is incorrect to speak of the cost of capital for funds already committed in the past. However, if the effect of regulation is to limit a regulated firm's expected returns on new investment to the maximum rate of return allowed on past investment, then the cost of capital is the proper basis for the return allowed on past investments. For illustration, assume that a regulated firm's allowed rate of return on past investments was set initially below the cost of capital. The effect of undertaking new investments providing returns no less than the cost of capital would be to increase the overall return on past investment. If regulatory practice requires that the overall rate of return be immediately reduced to the previous level, then the new investments would earn less than their cost of capital. On the other hand, if a rate of return equal to the cost of capital is allowed on existing investment, then new investments also earning the cost of capital would not raise the rate of return above an acceptable level. Thus, under this type of regulation, a return on existing assets equal to the cost of capital provides investors with the minimum return they require in order to finance new investments.

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[2] Ex Parte No. 338, "Initial Statement of Views and Arguments on Behalf of General Mills, Inc.," p. 12, "Reply Statement of General Mills, Inc. to the Opening Statement of Special Projects Counsel," p. 21; Ex Parte No. 271, "Joint Reply and Supplemental Verified Statement of Robert A. Nelson on Behalf of General Mills, Inc., American Paper Institute, Certain-Teed Products Corp., and Ford Motor Company."

As described in the report of the Coordinator in Ex Parte No. 271 (pp. 1497-98), the fair rate of return approach to regulation is most closely associated with the regulation of public utilities:

> As applied to the railroad industry, rate of return on investment is a useful indicator of relative profitability. It is not, however, appropriate as a standard of reasonable earnings on the same basis as used in public utility regulation. There is an apparent similarity between railroads and such utilities in the sense that both require huge capital investments and provide services of unusual public necessity. This similarity, however, fades in significance as a practical guide to regulatory policy when recognition is given to the economic circumstances surrounding their respective operations. For the most part, public utilities function as single-firm monopolies in circumscribed markets. When demands for services require, utilities are obligated to finance and construct such plant as may be needed irrespective of the costs involved. To meet this situation, the utilities' revenue needs are calculated as the sum of oeprating costs, including depreciation, plus a fair return on the rate base as determined by the regulators. As a consequence of the reasonable assumption that the protected market will support the rate structure implied by the revenue needs, the business risk related to the low capital turnover is shifted from the owners and creditors of the utility to consumers.

The common carrier obligations imposed upon public utilities require that they meet all reasonable demands for service without regard for whether the expected returns on additional capital expenditures required are equal to the cost of capital. Public utility management and its investors would not willingly undertake unprofitable new investments unless its investors are—to some extent—guaranteed against the possibility of the nonrecoupment of capital and an additional amount to cover their opportunity costs of capital.

The principle which underlies the application of overall rate of return regulation to public utility industries requires the grant of a monopoly franchise in order to minimize the business risks of flunctuating earnings which would otherwise occur as a result of direct price competition and competitive entry. Because the utility is provided the opportunity to adjust its rates so that its realized rate of return remains approximately equal to the cost of capital, its returns on existing investments must be to some extent guaranteed against unanticipated changes in costs or demand. The result of these procedures is to stabilize realized earnings and reduce the costs of capital to a public utility. These procedures imply that the general rate level is reasonable if the overall rate of return is fair.[3]

In Ex Parte No. 271, the Coordinator indicated his belief that sole reliance on a fair return standard for railroads would be futile:

> Despite any authority this Commission might grant to increase the level of revenues through rate adjustment, competition would curb the opportunities to apply the full measure. Since revenues required by the implementation of a fair return on rate base standard, as used in the regulation of public utilities, cannot be obtained, it would be futile, indeed, for the Commission to rely upon it exclusively as the test of reasonableness. Rather its role in railroad general revenue proceedings as just one financial indicia of revenue need *** should be maintained.

Even if a return equal to the cost of capital could be achieved, it would not necessarily be proper as the sole measure of adequate revenue under present conditions. Adequate revenue under section 15a(4) should be the revenue that would motivate the railroads to make all investments that are economically justified in the provision of needed service. To have this level of revenue indicated accurately by a fair return standard would require a rate base which is not in excess of the earnings capacity of the property. It would require a sound financial structure so that railroads will be willing to finance and undertake profitable investment opportunities at rates of return on new investments equal to investors' cost of capital of investment opportunities of similar risk. Finally, it would require a rate structure which makes socially desirable railroad investments profitable ones for the railroads to undertake. Adequate revenue determination for railroads, then, should not be based simply on a rate of return at the cost of capital rate. It should also give attention to a direct appraisal of the carriers' capital needs, and of their ability to finance those needs.

THE RATE OF RETURN STANDARD COMPOSITION OF THE RATE BASE

The notice of rulemaking proposed that net investment in transportation property be the base upon which the rate of return is computed for purposes of section 15a(4). In Ex Parte No. 271, the Coordinator recommended the continued use of this base.

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[3] This was the contention by Chief Justice Taft that the *Smyth & Ames* rule by the Supreme Court provides: "If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so." *Dayton-Goose Creek Ry. v. United States*, 263 U.S. 456, 481, 483 (1924).

As indicated in the notice of rulemaking, exceptions to the Coordinator's report (to the extent pertinent to the purposes of section 15a(4) are being considered by the entire Commission in the present proceeding. Exceptions have been filed by the railroads, by the Commission's Special Projects Staff (SPS) and by the Water Transport Association (WTA).

Issues concerning use of the net investment base, arising from the Coordinator's recommendations, the exceptions, and the comments of participants in present proceeding, concern the following matters: use of replacement cost instead of depreciated book investment as the rate base; exclusion of account 80 (Other Elements of Investment) from the net investment base; treatment of account 90 (Construction Work in Progress) and account 76 (Interest During Construction); composition of the working capital allowance; depreciation of certain grading and improvement accounts; and depreciation of track accounts. These issues will be discussed individually.

ACCEPTABILITY OF THE NET INVESTMENT BASE IN GENERAL

The net investment base now used by the Commission in the original or estimated original cost of property, including land, used in transportation, less depreciation, plus an allowance for working capital, consisting of cash and the cost of materials and supplies. Ex Parte No. 271, *Net Investment—Railroad Rate Base & Rate of Return*, 345 I.C.C. 1492, 1499 (1976).

The Coordinator recommended continued use of the net investment rate base, rather than of some alternative, such as replacement cost. His report discussed in great detail the history of the Commission's valuation policies.[4] Generally, the Coordinator's opinion was that a reproduction cost approach to rate base analysis was unworkable; he noted that the "Commission adopted the net investment base concept in the 1920's only after many fruitless labors with fair value rate base as a result of the *Smyth* v. *Ames* doctrine."[5] In conclusion, the Coordinator found that the present original cost net investment rate base should be retained and that there was no evidence of record justifying significant write-downs of net investment base.[6]

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[4] 345 I.C.C. at 1494, 1515-1520.

Ibid. at 1520.

Ibid. at 1604.

358 I.C.C.

On exceptions to the Coordinator's report, WTA assails the treatment by the Coordinator of (1) the issues concerning the valuation of plant and equipment in the investment base, and (2) the asset valuation basis for computing depreciation expense in determining carrier profit and rate of return. WTA asserts that there was neither recognition in the Coordinator's report of the debate on the issue of original versus current or replacement cost in the accounting profession, nor recognition of the fact that the Securities and Exchange Commission currently requires disclosure by corporations (including railroads) of financial data regarding current replacement costs.

In support of current replacement cost for valuaiton purposes, WTA contends that the use of historic cost understates asset values in the investment base and overstates profits because of inadequate allowance for depreciation. Furthermore, WTA suggests that failure to reflect the current replacement cost of productive assets in the valuation of the investment base creates a "capital illusion" in which the real amount of investment capital required is understated. And finally, WTA states that it is difficult to reconcile the Commission's past treatment of recognizing the relevance of replacement values in pipeline[7] and tank car[8] situations, and its refusal in the Coordinator's report to recognize a similar relevance in Ex Parte No. 271.

In reply to the exceptions filed by WTA on this issue, the railroads and SPS encourage the adoption of the Coordinator's finding that the present original cost net investment base should be retained. The railroads argue that the Commission's net investment rate base reflects the overwhelming approach of most regulatory agencies, and that the complexities and complications inherent in determining a reproduction rate base would be both expensive and time consuming for the railroads and the Commission. Additionally, the railroads note that the replacement cost reporting requirements of the Securities and Exchange Commission concern financial reporting and not the propriety of such a base for ratemaking purposes.

The Special Projects Staff, in its response to WTA, states that it does not believe the record supports the acceptance of a current value concept for the net investment base, or that current conditions warrant such a change from the original cost basis.

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[7] *Petroleum Products, Williams Bros., Pipe Line Co.*, 355 I.C.C. 479 (1976).

[8] *Tank Car Allowances, Southern Ry. System*, 329 I.C.C. 466 (1967).

Moreover, SPS asserts that any modification of an existing method should be thoroughly evaluated prior to acceptance of the replacement cost proposal suggested by WTA.

In response to the notice of proposed rulemaking in this proceeding, several parties responded in their initial statements or replies to the issue of original versus replacement cost.

The railroads urge the Commission's endorsement of the Coordinator's finding in Ex Parte No. 271 that the net investment base is reasonably stated. In reply to the suggestion by several parties that a "fair value" rate base be used in lieu of a "net investment" rate base, the railroads respond that there are extremely difficult measurement problems presented by a "fair value" rate base reflecting replacement cost, trended original cost, or new reproduction cost less depreciation. With respect to the impact of inflation, the railroads further argue that nearly all regulatory commissions have rejected the fair value rate base as a means of recognizing the effects of inflation. Finally, the railroads submit that no basis exists to depart in this proceeding from the recommendations of the Coordinator with regard to the use of the net investment rate base.

NITL also agrees with the Coordinator's opinion that the reproduction cost approach to rate base analysis is unworkable, and states that a deviation from historic cost to either reproduction or replacement cost would involve tremendous complexities and expenses to all concerned. However, NITL's acceptance of the net investment base concept is conditional upon the demonstrated accuracy of the rate base as including: (1) original cost of transportation property (as a ceiling on net investment), (2) prudently attained or acquired property, (3) used and useful property in actual transportation service, (4) property properly adjusted downward when transferred or acquired at less than depreciated original costs, (5) property properly adjusted to reflect credit for gains or sales of former transportation properties, (6) the reflection of all accrued depreciation, and (7) the exclusion of leased property.

The American Paper Institute (API) has no objection to use of the net investment rate base, but believes that the Commission's method of determining net investment should be reevaluated prior to determining the reasonableness of the present net investment base. API argues that unless the net investment base is accurately stated, it is not an appropriate rate base.

Several parties oppose the use of a net investment rate base, and contend that use of original cost fails to give proper weight to the effects of inflation. The Water Transport Association and the Transportation Association of America state that the use of historic costs as a rate base is unrealistic in periods of inflation, and WTA asserts that if economic profit is to be expressed in terms of rate of return on capital, such capital must be expressed in terms of the current replacement costs of the assets in order to allow for full economic depreciation. Similarly, Arthur Andersen & Company also suggests that the calculation of the fair value of property in service and the depreciation and obsolescence to be reflected in such a finding would be preferable to historical costs and past experiences.

With regard to the issue of asset valuation, DOT initially petitioned the Commission on April 30, 1976, for a rulemaking proceeding to determine whether railroad property should be valued at replacement cost rather than original cost. The petition was denied by the Commission as premature, since the issue of replacement versus original cost was subject to further comments in this proceedings.

DOT notes in its reply statement that the Financial Accounting Standards Board (FASB) is currently studying the question of the use of historical cost. In light of the ongoing study by the FASB, DOT recommends that the Commission not change valuation methods in connection with the present proceeding, and await that outcome of the FASB study and hearings.

Discussion and conclusions.—The question of current or replacement cost versus historic or original cost in valuation of railroad property has been a much discussed issue before the Commission. We believe, however, that a decision to change the valuation methods currently used by the Commission would be inappropriate at the present time. Accordingly, we adopt the conclusion of the Coordinator in Ex Parte No. 271 that the original cost net investment rate base should be retained.

Commission policy in revenue proceedings, over a long period of time and experience, has been that a return on investment should be calculated on the basis of original cost less depreciation and amortization. See *Increased Freight Rates, 1968*, 332 I.C.C. 590 (1968); *Increased Freight Rates, E., W., & S. Territories, 1956*, 300 I.C.C. 633 (1957). Previously, Commission valuation studies based on current value had proved to be impractical, extremely expensive, and subject to great differences of opinion of value.[9]

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[9] 345 I.C.C. 1494 at 1521

There is no evidence of record which indicates that the same conditions would not exist if the Commission were to undertake a property valuation based on current or replacement costs. Although WTA accurately notes that the Securities and Exchange Commission requires railroad coprorations to disclose information regarding replacement costs in their financial data reports, we agree with the railroads that the type of reporting required for accuracy in financial statements does not automatically allow for use of the data in calculating a rate base for ratemaking purposes.

It is also evident that in those instances where the Commission has opted to use replacement cost in its calculations, the situations pertain to either a different transportation system (pipeline) or a small segment of railroad properties (tank cars). A replacement or reproduction cost approach in determining asset valuations of the entire railroad industry is an undertaking of an entirely different magnitude. As noted in the Coordinator's report, 1,550 persons were engaged in valuation work when a valuation rate base was used; similar difficulties would be encountered in a replacement cost approach. We conclude that such a basis for rate of return analysis is neither practical nor warranted at this time.

With respect to the conditions which NITL suggests for use of a net investment rate base, we agree in principal with NITL that the net investment rate base should accurately reflect historical costs. However, we also concur with the statement by the Coordinator that a writedown of asset values or a determination of all used or useful transportation property for rate base consideration appears to be difficult to accomplish. We agree with the used and useful concept and will consider in the future ways of implementing it short of the massive effort required by a physical valuation of rail properties.

The question of the use of historical cost in asset valuation is currently being addressed by a study and in hearings initiated by the Financial Accounting Standards Board. The railroad industry and the Interstate Commerce Commission have participated in hearings recently held in January of this year, and we will continue to present our views and obtain information in conecction with the type of measurement ultimately recommended in valuing fixed assets.

In choosing to retain the present original cost net investment rate base, we do not ignore the economic reality that historical cost may differ from replacement cost during an inflationary period. However, we agree with the Coordinator that the problem of inflation should be dealt with in the rate of return and other measures of revenue adequacy, rather than in a restatement of the rate base.

Inclusion of Account 80

Account 80 reflects the adjustments necessary to reconcile the railroads' original historical book values with the new book values required by the Commission in 1963 to be recorded as carrier assets on their balance sheets. Debit entries to account 80 reflect writedowns in asset book values to the 1910-14 valuation basis in the primary property accounts. Credit entries to this account apply to writeups of asset book values to the 1910-14 valuation basis, writedowns in capitalization following the reorganization of the 1930's and 1940's, and donations and grants. Items in the account are to be disposed of gradually as property is retired from service. Currently, debit balances in account 80 have been largely written off.[10]

In Ex Parte No. 271, the railroads sought to have the relatively small net debit balances in account 80 included in the rate base. As more fully discussed by the Coordinator, the Commission has rejected inclusion of account 80 debits for rate base purposes as unsupported historically recorded items, inconsistent with values established by the Commission's valuations pursuant to section 19a of the act.[11] Consistent with that position the Coordinator found that the valuation-based costs were the best evidence of the original cost of building the Nation's railroads, and that the unsupported items of account 80, though small, should be left out of an original cost, less depreciation, rate base. The Coordinator rejected the SPS's proposal that account 80 debits be excluded and credits included as incongruous and untenable.

On exceptions, the railroads collectively decided not to challenge the Coordinator's findings with respect to account 80 in determining an *industry* rate base. However, they contend that the propriety of including account 80 debits should properly be determined on the merits in individual proceedings. They urge that the Coordinator's recommendation be adopted without prejudice to a resolution of unsettled elements of that account in individual cases.

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[10] As of 1972, the balances in account 80 were as follows: debits, $700 million and credits, $410 million. 345 I.C.C. at 1537-38. The Coordinator pointed out that these amounts were relatively insignificant compared with a 1972 net investment base of some $27 billion—less than one-half of 1 percent. 345 I.C.C. at 1503. Although current figures are not available, it can be assumed that net debits in account 80 are even less significant presently since considerable property has undoubtedly been retired from service since 1972.

[11] 345 I.C.C. at 1537-39.

The Special Projects Staff on exceptions, urges the Commission to adopt the position that account 80 debits should be excluded and credits included in the net investment base. SPS contends that their proposed treatment of account 80 is consistent with (1) the Commission's current accounting practices used in connection with acquisition of properties by purchase, donation, or reorganization and (2) the treatment that has generally been followed when railroads have cleared balances from account 80. SPS alleges that adoption of their proposal would merely implement the current practice of recording acquisition cost and not allowing amounts in excess of cost to be recorded for acquired or donated property. Such treatment, SPS argues, also puts carriers that have not cleared account 80 balances on the same basis as those that have cleared such balances.

On the basis of 1972 figures, SPS states that its approach would result in the net investment base being decreased by $400 million more than would the Coordinator's proposal to exclude all account 80 debits and credits.

In reply to the railroads' exception to the Coordinator's finding on this issue, SPS modified its recommendation to allow inclusion of account 80 debits or exclusion of account 80 credits in determining the net investment base when there is a specific showing by the carrier and finding by the Commission that the resultant amount does not exceed the lesser of:

> (1) The original cost to the carrier when the property was first dedicated to common carrier service, or
>
> (2) The cost of acquisition when transportation property was purchased or otherwise acquired from another railroad.

Discussion and conclusions.—We agree with the Special Projects Staff that account 80 debits but not credits should be excluded from the rate base. The SPS proposal to include account 80 credits is consistent with the current practice of recording acquisition costs and not allowing amounts in excess of cost to be recorded for acquired or donated property.

We recognize that individual carriers may have legitimate disputes with respect to the inclusion or exclusion of account 80 items and that those unsettled matters may properly be determined and evaluated upon evidence presented in individual proceedings. In accordance with SPS's suggestion, account 80 items should be allowed in determination of net investment base in individual proceedings where there is a specific showing by the carrier and finding by the Commission that the resultant amount does not exceed either the original cost to the carrier when the property was first dedicated to common carrier service, or the cost of acquisition when transportation property was purchased or otherwise acquired from another railroad.

TREATMENT OF ACCOUNTS 90 AND 76

An issue raised in Ex Parte No. 271 was whether amounts in account 90, Construction Work in Progress, should be included in the rate base as urged by the railroads. A suggested alternative was to include the carrying cost[12] of such amounts in the rate base through a redefinition of account 76, Interest During Construction, which at present reflects only *debt* carrying costs. The Coordinator assumed that the railroads had dropped their original proposal to include account 90 in the rate base and therefore addressed only the suggested alternative, i.e., modification of account 76.[13] The proposed modification would require imputing "interest" on equity funds used in construction. In his discussion, the Coordinator stated that he was opposed to the suggested change on the basis of so-called "phantom profits" that would result from recognition of addition income (through imputation of equity costs) that would not be supported by cash. He concluded that:

> [a] decision to impute interest to equity would have only a minor impact on the railroads' reported earnings and working capital. The extra work and effort appear not to be worthwhile for such a small incentive to new investment. Giving primary weight to the inconsequential nature of the suggested change and the possibility of dividend payments in excess of cash income, the Coordinator rejects the suggestion to impute interest to equity funds tied up in construction.[14]

On exceptions, the railroads contested the Coordinator's summary denial of the industry's request to record amounts in account 90 in the rate base, contending that the industry had not waived that proposal and indeed continued to urge that approach in preference to the alternative modification of account 76. In support, the railroads argue that account 90 already exists as a property account and provides an appropriate means for inclusion of funds expended for construction work in progress whether the source of the funds is borrowed capital or equity capital. The railroads allege that unlike the large projects or plants of utilities which do not come on line for many years, rail construction projects are typically piecemeal and of short duration and, therefore, their inclusion in the rate base is proper and realistic.

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[12] For rate base purposes, the expression "carrying costs" refers to the cost of capital committed to construction projects short of completion. The carrying cost of debt is the actual interest paid by the railroad on all borrowings of capital committed to the project. The carrying costs of equity is generally construed to mean a reasonable return allowance on any equity funds committed to the project. 345 I.C.C. at 1503.

[13] 345 I.C.C. at 1503.

[14] Ibid. at 1541.

With respect to the cost of equity capital used in construction projects, the railroads stress that such funds are neither free nor costless and should be recognized in one way or another in either account 76 or account 90. They argue that it is an untenable distinction to permit a railroad which borrows construction funds to receive interest recognition on such borrowed debt while denying any allowance to a railroad which uses internal sources of equity funds for the same purpose.

SPS also takes exception to the Coordinator's finding, agreeing with the railroads that the net investment base should include account 90 rather than account 76. SPS contends that it would be reasonable to allow account 90 to remain in the rate base even though the underlying property is not in service, so long as account 76 is removed from the rate base. The primary concern, SPS points out, is that recognition be given in the rate base for all funds committed to construction, (1) during the construction period, or (2) during the period the completed asset is in service, but not both.

Moreover, SPS argues that inclusion of account 90 rather than account 76 is consistent with the trend, recognized by the Coordinator, toward recognition of construction funds as a rate base item rather than imputing so-called interest on these funds. With respect to the Coordinator's expressed concern over "phantom profit" SPS states that it appreciates the concern but believes that it is not proper to deprive a railroad of recognition of equity funds that have been dedicated to, and are being used in the construction of transportation property.

Discussion and conclusions.—In view of the positions taken by the railroads and SPS on exceptions, we do not believe that adequate consideration was given in the Coordinator's report to the proposal that account 90, Construction Work in Progress, be included in the net investment base. The issue of whether funds committed to construction projects which are not yet "on line" or dedicated to public service should be included in rate base has been the subject of much discussion in recent years in the field of public utility regulation in general. However the railroads' position is distinguishable from that of electric utilities, for example, whose generating facilities which are currently being constructed will not benefit their rate payers for many years to come. We believe that the railroads' contention that, in general, rail construction projects are of a relatively short duration has merit and that therefore inclusion of Construction Work in Progress is both proper and realistic and should be adopted. Concomitantly, the inclusion of accrued interest during construction on borrowed funds now in account 76 must be discontinued to avoid duplication.

COMPOSITION OF THE WORKING CAPITAL ALLOWANCE

In Ex Parte No. 271 two methods of computing a working capital allowance for inclusion in the rate base were presented to the Coordinator. The SPS proposed use of the Commission's Cost and Valuation Section's Rail Form A formula, which defines working capital as the lesser of "needed" or actual working capital. The railroads favored continued use of the currently employed working capital definition—cash on hand plus materials and supplies. The Coordinator found that the SPS proposal was superior. Among other advantages, he noted that unlike the traditional definition, the Rail Form A formula recognizes and more accurately measures the dynamic nature of working capital and would not be subject to potential manipulation by the carrier to inflate working capital temporarily. The Coordinator expressed agreement with the SPS's comment that carriers whose working capital investments exceed the formula should not be compensated for their excessive liquidity; conversely, carriers with a deficient working capital investment should earn a return only on the monies they have actually committed.

On exceptions, the railroads contend that the Coordinator's recommendation places undue emphasis on a formula as opposed to reality and that the record in Ex Parte No. 271 provided no indication that the industry has "excess liquidity" or that working capital is or may be inflated. The railroads argue that under the formula, subjective judgments are necessarily involved in measuring "excessive liquidity" or "inflated" working capital and that no consideration is given to varied underlying reasons affecting managements' determination of working capital. A decline in industry working capital from $1.8 billion in 1951 to $664 million in 1973 allegedly refutes any implication of excessive liquidity.

As to potential inflation of working capital, the railroads maintain that, at present and prospective costs of money, and considering the stringency of funds confronting railroad management, it is unreasonable to assume that they would deliberately maintain idle resources to inflate an allowance for working capital in the rate base. Moreover, that concern can be easily alleviated, the railroads argue, through normalizing or averaging several quarters.

In reply, SPS concedes that its proposed Rail Form A working capital "need" approach does place emphasis on a formula, but that it forms a more realistic component of the rate base than does a method which includes items on which a return should not be paid by shippers because the items are not necessary for performing common carrier service obligations. It is SPS's view that the railroads proposed "short-cut method" of recognizing cash plus material and supplies (taken from the balance sheet) improperly includes in the net investment base such items as (1) cash amounts which represent past earnings accumulated for payment of a return to investors or for the return of an investment, and (2) materials and supplies held or accumulated for capital construction projects. SPS contends that the Rail Form A formula would eliminate these items from inclusion in the rate base. Moreover, since the Commission annually computes an appropriate provision for working capital, there is no administrative problem in adopting the proposed method.

In response to the railroads' contention that the evidence in Ex Parte No. 271 does not support a finding of "excess liquidity," SPS argues that the use of the term "working capital" in the evaluation of liquidity is not relevant to the determination of the net investment base. SPS urges the Commission to ignore the railroads' proferred evidence on the decline in industry working capital figures between 1951 and 1973 because, in and of themselves, they have no meaning.

Discussion and conclusions.—We agree with the Coordinator's recommendation that the Rail Form A approach should be adopted in computing working capital in preference to the cash-on-hand-plus-materials-and-supplies definition. While there is no evidence (in this proceeding or Ex Parte No. 271) that the industry has manipulated working capital to inflate the rate base under the current definition, the Rail Form A approach is nevertheless preferable because it will eliminate items from the rate base which are not properly chargeable to shippers. These items include funds necessary to meet maturing obligations, interest on indebtedness, dividends, and expenditures for improvements.

DEPRECIATION OF CERTAIN GRADING AND IMPROVEMENT ACCOUNTS

During the course of the proceeding in Ex Parte No. 271, it was discovered that, contrary to prior assumptions, there were determinable service lives for items in the following property accounts: 2 1/2, Other Right-of-Way Expenditures; 3, Grading; 5, Tunnels and Subways; and 39, Public Improvements—Construction. The Coordinator recommended that accounting rule changes be considered to make accounts 2 1/2, 3, 5, and 39 fully depreciable.

In the exceptions to the Coordinator's report, only the Special Projects Staff commented on this question. It appears to support the Coordinator's recommendation, although it feels that the depreciation of track accounts is more important. It also urges that consideration be given to the possibility of segregating account 3 into depreciable and nondepreciable categories. The statement of General Mills also supports the Coordinator's recommendation, and suggests a special rulemaking proceeding to consider its implementation.

We agree that adoption of the described changes in accounts 2 1/2, 3, 5, and 39 warrants our consideration. We shall formulate the appropriate modifications of our regulations and publish them for public comment in a separate proceeding within a few months.

DEPRECIATION OF TRACK ACCOUNTS

A question discussed in Ex Parte No. 271 was whether depreciation rather than betterment accounting should be used for track accounts. A study of the Western Maryland Railway Company showed that the rate base and rate of return of that railroad would not have changed significantly if depreciation accounting for track were adopted. Moreover, the railroads contended that the net investment base would be about the same under either method of accounting for track.

Nevertheless, the Coordinator recognized that there were problems incident to betterment accounting for track. While not recommending a change in accounting method, he did urge the Commission to remain attentive to the question.

On exceptions to the Coordinator's report, SPS supports the concept of depreciation accounting for track and recommends that a separate rulemaking proceeding be instituted on the subject. DOT similarly requests a separate rulemaking proceeding, and notes that the Securities and Exchange Commission has also requested comments on this issue.[15] The railroads, while not urging a change of accounting methods, also state that the proper place to deal with the question would be in a separate rulemaking proceeding.

The question of whether depreciation accounting should be applied to track accounts is surely one of the most important questions related to the measurement of the net investment base. There is a widespread feeling that depreciation accounting would permit a truer reflection of the value of this portion of railroad property. However, before we could adopt an accounting change of this magnitude, or even endorse it as a matter of policy, there will need to be a fuller exploration of the implications of this change, and of the problems that must be overcome in order to accomplish the change, than has been possible on the present record. We intend to pursue this matter actively in a separate proceeding. On January 18, 1978, a notice was served in docket No. 36557, Reporting Railroad Track Maintenance, and docket No. 36557 (Sub-No. 1), Depreciation v. Betterment Accounting for Railroad Track Structure, scheduling an informal conference on February 1, 1978.

Summary—Net Investment Base

We shall continue to employ the net investment base as the rate base for application of the fair return standard. The only present changes in the composition of that base are that we will include account 80 credits; we will include account 90 rather than account 76 with respect to capital invested in construction projects; we will compute the working capital allowance according to the Rail Form A formula; and, as discussed in the next section, we will deduct the amount of the deferred tax account.

The Rate of Return Standard: Measurement of Income

The notice of rulemaking proposed that net railway operating income continue to be used as the measure of income for purposes of computing the return on investment. Those participants who commented on the subject agree in general with the use of net railway operating income. Issues are raised concerning two particular aspects: the depreciation allowance and the income tax allowance.

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[15] SEC Release Nos. 33-5824 and 34-13479, April 28, 1977.

THE ALLOWANCE FOR DEPRECIATION

The Commission makes its determinations of the net investment base primarily from the property records of individual railroads. The Commission records the gross investment costs of transportation property in service from which is deducted accumulated depreciation. The calculation of depreciation is based upon (a) estimates of depreciable property lives and (b) an annual depreciation rate which is applied against gross investment costs. Depreciation for "book" purposes (as distinguished from tax depreciation) affects the calculation of return on net investment in two ways. A depreciation charge allocated to an accounting period is an expense of that period which is deducted from revenues to determine pretax income. Accumulated depreciation is a deduction from gross investment to determine net investment (rate base) costs.

In Ex Parte No. 271, a question was raised as to whether accelerated rather than straight-line depreciation should be used. The contention has been made by certain parties in past general revenue cases that the net investment rate base is overvalued. This contention was based, in part, on the assertion that past depreciation charges and reserves are too low. Shippers argued that present depreciation accruals do not account for charges against revenues which should have been made prior to the adoption of depreciation accounting for roadway structures in 1943. Moreover, they argued that past depreciation charges since its adoption have been too low.

The railroads addressed these contentions in their initial testimony in Ex Parte No. 271. The railroads' witness, Burton N. Behling, argued that "a mere shrinking of their net investment by writeoff" would not generate any additional funds required for the industry's investment needs. Behling addressed the argument that the industry had failed adequately to amortize past investments by reference to anticipated earnings as follows:

> Finally, it is relevant to point out that if depreciation charges (and reserves) in the past are considered to have been too low, the other side of that coin is that past low earnings were overstated. A reduction now of net investment by increasing reserves for past depreciation would also, in effect, deprive the railroads of the opportunity to recover their past investment to the extent of such writedown. (Initial Statement of Burton N. Behling, 14-15).

Dr. Robert A. Nelson on behalf of General Mills and other large shippers, and Dr. Robley Winfrey on behalf of the Special Projects

Staff, submitted extensive testimony addressed to Commission depreciation practices. In addition, the Coordinator's report specified the procedures used by the Commission to develop service lives, salvage values, and depreciation reserves.

Dr. Nelson testified that "properly included in the rate base, and its evaluation over time, can be treated by the Commission according to accounting methods which are more consistent with economic values in a relatively high risk and declining industry than those methods presently followed." He recommended that the Commission adopt accounting practices developed in the nonregulated sectors to address industries facing similar competitive pressures and rapid technological change. Dr. Nelson recommended the adoption of methods of accelerated depreciation which better reflect the decline in economic value of assets over time than straight line methods. Accelerated depreciation methods allocate most of the acquisition costs of investment to the first half of the facility's life where an asset's economic life is uncertain.

Dr. Winfrey's testimony endorsed the statistical procedure and application of a depreciation study by the Bureau of Accounts released for comment in Ex Parte No. 271. According to Dr. Winfrey, the purpose of deducting depreciation:

> *** is to account for the amount of invested capital that has been recovered by the investor (or consumed in service), because the business is no longer expected to earn a return on that capital that has already been recouped by the investor.

Statistical methods applied to historical installation and retirement experience measure historical (or realized) average life. Dr. Winfrey states that what is required is an estimate of future probable service lives over which to charge off the original cost of depreciable property. In addressing factors affecting retirement Dr. Winfrey noted that retirements are influenced by a multitude of factors and therefore:

> No specific property can be assumed to have a specific physical life, a specific economical life, nor a specific technological life. All such properties simply have a service life.

The Coordinator's report determined the validity of the railroads' accrued depreciation. The study fit a family of survival curves to book original cost gross additions of roadway structures in order to simulate a retirment pattern and calculate an average service life. Applying this life and calculating an appropriate salvage factor, a depreciation rate was developed for each group of assets for each railroad, which was then applied against original cost to calculate accrued depreciation. The report concluded that the present original cost net investment base should be retained and that there is no evidence of record justifying significant writedowns of net investment base. Further, the report stated "that straight line depreciation as presently administered by the Commission should be retained, that presently stated depreciation reserves are adequate and are similar to what they would have been had ratable depreciation been followed."

This issue was not addressed by many of the parties in the present proceeding. General Mills and the American Paper Institute indicate a preference for accelerated depreciation, GMI stating that it would help "cover the effects of inflation." The railroads, on the other hand, consider the issue to be too complex for resolution in the present proceeding.

Discussion and conclusion.—We do not agree that accelerated depreciation is the proper approach to covering the effects of inflation. It would still be based on historical rather than replacement cost. Moreover, its application, once begun, is not affected by the rate of inflation, which may fluctuate between high and low levels.

However, accelerated depreciation does have some appeal from the standpoint of reflecting the rapid decline in service value that can result from either technological change or shifting market patterns.

The economic value of productive property declines because of increased costs required to maintain the plant at a given standard, shifts in demand (type/location) and cost-saving technological change. The development of and justification for liberalized depreciation methods for tax purposes in the early 1940's was based in part on the argument by some nonregulated industrial firms that liberalized depreciation for book purposes was necessary if the accounts were to reflect the rapidly changing market environment in which they operated. Rapid obsolescence in the face of continuously increasing productivity made possible by new technology indicated that a significant portion of original investment costs would have to be depreciated in the early years of an asset's productive life, or special obsolescence writeoffs very probably would have to be incurred in latter periods.

The low rates of return achieved by railroads in recent years may be attributable, to some extent, to a failure to amortize invested capital by reference to anticipated obsolescence and the growth of a competitive environment. For a utility with strong monopoly markets these costs of obsolescence can readily be passed on to future consumers. But, for railroads faced with competition in markets which they serve, the use of straight line depreciation may have resulted in placing such railroads at a significant competitive disadvantage. Whereas new competitors will price to cover the costs of serving with the new technology, railroads must cover additional costs where past depreciation policy did not reflect the full impact of economic obsolescence.

While there may be some practical problems associated with a changeover to accelerated depreciation or some other new method, we do not rule out the possibility of such a shift. However, we conclude that this is an issue that would need to be explored more thoroughly than has been possible on the present record. Moreover, as noted, the rate of return standard will not be given controlling weight in judging revenue adequacy, but will be balanced against other considerations. Thus, the depreciation method used, while important, is not of urgent consequence for the immediate future. We shall, then, adhere to straight-line depreciation reporting at present, but shall give the question of accelerated depreciation or some other method further attention.

THE ALLOWANCE FOR INCOME TAXES

In the computation of the return on net investment, an important item deducted from railway operating revenue is income tax. Identification of the amount of this item presents a point of difficulty, because the amount of tax actually paid is not necessarily the amount to be recognized in computing the return on investment.

The actual tax paid, or in other words, the "effective tax rate," may be substantially less than the statutory tax rate (now 48 percent) largely because of two factors: accelerated depreciation and the investment tax credit.

The use of accelerated depreciation for tax reporting purposes results in a lower tax than would result from application of the statutory tax rate to income computed by Commission rules, where straight-line depreciation is used. The tax savings from use of accelerated depreciation for tax purposes is often referred to as a "deferred" tax, on the theory that it must be paid in future years when depreciation expense reported for tax purposes falls below the straight-line depreciation reported to the Commission. The investment tax credit also reduces the tax below the amount that would result from application of the statutory tax rate.

Use of the effective tax rate in computing carrier income is referred to as the "flow-through" method, from the observation that it flows through the gain from these tax benefits to the carrier's customers, while use of the statutory tax rate would allow the gain from such benefits to be retained by the carrier.

In Ex Parte No. 271, the Coordinator stated that present Commission policy employs "the flow-through method of accounting for taxes for ratemaking purposes and the deferred tax method for reporting purposes." 345 I.C.C. at 1511. Noting that the Commission had previously considered and rejected the deferred tax concept for ratemaking,[16] the Coordinator's belief was that both bases are appropriate for ratemaking consideration.

On exceptions to the Coordinator's report, the Special Projects Staff recommends that net railway operating income not include the deferred income tax expense. If the Commission would decide to deduct the deferred income tax expense, however, SPS contends that consistent treatment would require deduction of the deferred tax account from the net investment base.

In reply to the exceptions filed by SPS, the railroads disagree with the SPS recommendations and assert that adoption of the "flow through" method of accounting is manifestly contrary to the intent of Congress in enacting the accelerated depreciation tax provisions. Moreover, the railroads submit that if the Commission allowed the deduction of deferred tax expense from railroad operating income but required the deduction of the deferred tax account from the net investment base, the effect is still the pass-through of tax benefits to the ratepayer.

The notice of rulemaking in the present proceeding raised the question of whether the amount of taxes recognized in computing net railway operating income (NROI) should include deferred taxes, or should be limited to taxes currently paid. General Mills states that the use of deferred taxes in calculating NROI represents the sounder regulatory policy for determining the adequacy of a railroad's revenues and earnings. On the other hand, NITL argues that the actual or "flow through" method should be followed in order to pass tax benefits through to the ratepayer. However, if the Commission should follow a contrary policy, then NITL believes that the deferred taxes must be treated as capital available to the carrier at no cost, that is, that deferred taxes should be deducted from the net investment base.

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[16] *Accounting For Federal Income Taxes*, 318 I.C.C. 803 (1963).

The railroads and the Transportation Association of America oppose any attempt to require that tax savings be passed directly through to users in the form of lower rates.

Discussion and conclusions.—The Commission previously considered the issue of an appropriate income tax rate for ratemaking in its report in *Accounting for Federal Income Taxes, supra.* The Commission concluded as follows:

> After consideration of the views for and against normal income taxes, different in amount from the income taxes actually payable, it has been decided that the charge to income each year for the year's Federal income taxes should be the amount produced by application of the effective tax regulations to transactions within the year. The present-day shipper should not be required to provide from current freight rates for possible increased taxes of the indefinite future. 318 I.C.C. at 807, quoting from Statement of Policy, *Accounting for Federal Income Taxes*, dated February 9, 1959.

The Commission's decision to recognize as income tax expense only those taxes currently payable reflected the commonly practiced (flow-through) method of accounting for income taxes at that time. Subsequently, the Commission chose to align its rules with generally accepted accounting principles which allowed for interperiod tax allocation. In docket No. 34178 (Sub-No. 2), *Accounting for Income Taxes—Interperiod Tax Allocation,* decided August 9, 1974, the Commission thereafter required all carriers subject to its accounting rules to account for income taxes using the deferred tax method. The stated objéction of that proceeding was to complement financial data presently available under flow-through accounting for income taxes.

The advantages and disadvantages of deferred versus flow-through accounting have been extensively debated in the field of public utility regulation. Proponents of deferred tax accounting commonly assert that the use of accelerated depreciation for income tax purposes results only in a deferral or postponement of tax payments and does not give rise to actual tax savings. They argue that to pass through tax reductions from the use of accelerated depreciation to ratepayers would confer a benefit to present ratepayers at the expense of future shippers, who in turn would be called upon to pay the increased taxes resulting after accelerated depreciation.

On the other hand, proponents of flow-through contend that an actual savings results because of continual depreciation of new investments. Therefore, accelerated depreciation results in higher depreciation charges and lower taxes not merely initially but year after year as long as the company undergoes normal growth. Actual tax savings will result if all of the following conditions continue: (1) the taxpayer makes the same or increasingly larger property expenditures each year, (2) the new property has approximately the same composite life expectancy, (3) section 167 of the Internal Revenue Code will continue in effect, (4) the taxpayer continues to use accelerated depreciation, and (5) the tax rate does not change.

In the case of the railroad industry, it is unclear whether the use of accelerated depreciation for income tax purposes will result in a deferral or postponement of tax payments, or will give rise to tax savings. It is true that accelerated depreciation results in higher depreciation charges not only initially, but year after year, provided that the company undergoes normal growth. But technically, unless a charge is made in the current year's income statement equivalent to the amount which may later become due, the present ratepayer may receive benefits which should properly inure to the future ratepayer. This is contrary to sound accounting and ratemaking principles, and is a factor in our decision to recognize deferred taxes in calculating the rate of return on net investment.

We must also examine the Congressional intent behind the relevant tax provisions of the Internal Revenue Code concerning both accelerated depreciation and the investment tax credit. A review of pertinent legislative history is helpful in this regard.

The legislative history of the tax provisions concerning the investment tax credit and, to a lessor extent accelerated depreciation, indicates that Congress intended the tax benefits ensuing from those provisions to aid businesses materially in the amount of available working capital and the financing of their expansion. When Congress enacted in 1954 sections 167(b)(2), (3), and (4) of the Internal Revenue Code, which permitted all taxpayers to take accelerated depreciation in the early years of an asset's life, the House Committee on Ways and Means made the following statement in its committee report:

> For all segments of the American economy, liberalized depreciation policies should assist modernization and expansion of industrial capacity, with resulting economic growth, increased production, and a higher standard of living. H.R. Rep. No. 1337, 83d Cong., 2d Sess. 24 (1954).

It is apparent, therefore, that deferred tax accounting more closely approximates the results intended by Congress in its establishment of accelerated depreication for income tax purposes.

Turning to the investment tax credit, we observe that it is a direct offset against the tax otherwise payable, and represents an actual tax savings. Instituted in the Revenue Act of 1962, the credit was originally proposed in President Kennedy's tax message of 1961 to Congress, suggesting amendments to the tax laws to "increase the modernization, productivity, and competitive status of American industry—to stimulate the expansion and growth of our economy." H.S. Doc. No. 140, 87th Cong., 1st Sess. 1 (1961).

To clarify the purpose of the investment tax credit, Congress enacted certain provisions of the Revenue Act of 1964 prohibiting regulatory agencies from "flow-through" accounting for ratemaking purposes with respect to the investment credit. Section 203(e) of the Revenue Act of 1964 provides as follows:

> TREATMENT OF INVESTMENT CREDIT BY FEDERAL REGULATORY AGENCIES. It was the intent of the Congress in providing an investment credit under section 38 of the Internal Revenue Code of 1954, and it is the intent of the Congress in repealing the reduction in basis required by section 48(g) of such Code, to provide an incentive for modernization and growth of private industry (including that portion thereof which is regulated). Accordingly, Congress does not intend that any agency or instrumentality of the United States having jurisdiction with respect to a taxpayer shall, without the consent of the taxpayer, use—
>
> (1) in the case of public utility property (as defined in section 46(c)(3)(B) of the Internal Revenue Code of 1954), more than a proportionate part (determined with reference to the average useful life of the property with respect to which the credit was allowed) of the credit against tax allowed for any taxable year by section 38 of such Code, or
>
> (2) in the case of any other property, any credit against tax allowed by section 38 of such Code
>
> to reduce such taxpayer's Federal income taxes for the purpose of establishing the cost of service of the taxpayer or to accomplish a similar result by any other method.

For purposes of establishing a taxpayer's cost of service, therefore, Congress directed Federal agencies regulating businesses other than public utilities not to "flow" the benefits of the investment credit "through" to customers at any time.

The pertinent legislative history of the investment tax credit and, perhaps to a lesser extent, the accelerated depreciation provisions of the Internal Revenue Code demonstrate the desire of Congress to have regulatory agencies treat tax benefits in a manner that encourages further investment of capital. While there are some advantages of using the actual tax rate, use of the statutory tax rate will assure that accelerated depreciation and the investment tax credit remain an incentive to capital spending.

We are cognizant of the fact that this treatment confers a benefit on the carriers, in that they are receiving and retaining revenue which is not accounted as income. As indicated by some of the parties, the capital funds arising from deferred taxes have been contributed by the ratepayers rather than by investors in the company. Thus, it is appropriate to deduct the deferred tax account from the net investment rate base prior to any calculation of rate or return.

In conclusion, net railway operating income, using the statutory tax rate, will be the measure of income used in computing the return on net investment.

THE RATE OF RETURN STANDARD: DETERMINATION OF THE COST OF CAPITAL

As we affirmed in our general discussion of the criteria of revenue adequacy, one important point of reference will be a rate of return on net investment equal to the carriers' cost of capital. It will be necessary in the independent revenue adequacy proceedings, to make a determination of the carriers' cost of capital.

In our notice of rulemaking we observed that, ordinarily, the cost of debt captial (an interest rate) and the cost of equity capital (earnings as a percentage of equity) are separately determined. The two are weighted according to the debt/equity structure to find the composite cost of capital as a percentage of the investment. We also noted that we contemplated allowing the parties freedom to show the carriers' cost of capital in the ways they considered most suitable at the time of a particular proceeding. However, we requested the participants' comments as to whether they believed that a particular technique for showing the cost of capital should be prescribed.

The most detailed comments on the determination of the cost of capital are contained in the testimony of Dr. Foster, submitted by the railroads. He indicates that the cost of debt can be based either on the interest rates of existing debt obligations (embedded debt), or on interest rates that would have to be paid for new borrowing. He states that the cost of new debt would be appropriate for use in determining the debt component of capital cost for new equipment and facilities. The embedded rate (adjusted for the cost of some additional borrowing in the near future) is appropriate in the overall revenue adequacy context.

Dr. Foster indicates that there are two approaches for determining the cost of equity capital. The "market value" approach determines shareholder earnings requirements from a study of the market price of stock in relation to earnings or dividends. The "comparable earnings" approach is based on a study of the rates of return on equity being achieved by industries of comparable risk. Dr. Foster states that the comparable earnings approach should be given preference in determining a fair return on equity, because it tends to exceed the level shown by the market value approach, and thus provides a higher rate of return to help offset the effects of inflation.

Discussion and conclusions.—We conclude that, for the purpose of determining the adequacy of the carriers' overall revenue, the cost of debt capital should be based on embedded interest rates (adjusted for some near-term borrowing at current rates, as for example, in the analysis of Dr. Foster). Accordingly, in the independent revenue adequacy proceeding, we shall make a finding of embedded interest rates for each class I carrier and for the district and national composites.

At the same time, we shall make a finding as to the average cost of new debt for a selected group of the more healthy carriers. Since the independent revenue adequacy proceeding will be a convenient occasion for determining the cost of new debt, we shall use it for making such a determination, which will then be available for whatever purposes it may be needed in other Commission proceedings.

As noted, Dr. Foster discusses two approaches to determining the cost of equity capital—the market value method and the comparable earnings method. We conclude that both are relevant for the purposes of determining a fair return on equity capital in the revenue adequacy proceeding. Accordingly, we shall make computations according to both methods, which can serve as a useful reference not only for the revenue adequacy proceeding, but also in other Commission proceedings where either type of data may be relevant.

In the revenue adequacy proceeding, the conclusion as to the cost of equity capital will be based on consideration of all the evidence of record. We do not believe that such discretion should be circumscribed at the presnt time by more specific rules concerning the techniques to be used in either the market value presentation or in the comparable earnings presentation, or in the amount of weight to be given one or the other. It may be that, after some experience is gained in the revenue adequacy proceeding, a need and basis may appear for more specific regulations. If so, appropriate revisions of our regulations can then be undertaken.

We note that specific techniques for finding the current cost of capital for per diem purposes have been prescribed in Ex Parte No. 334. We shall leave such procedures in effect until after the regulations prescribed herein have become effective and some experience has been gained under them. Thereafter, consideration will be given to deleting the prescription of cost of capital techniques from the Ex Parte No. 334 regulations, and providing simply that the cost of capital data for per diem purposes will be obtained from findings in the revenue adequacy proceeding.

In summary, in the independent revenue adequacy proceeding, we shall make findings as to the cost of embedded debt, the cost of new debt, the cost of equity capital according to comparable earnings studies. Upon consideration of these findings, we shall make a determination as to the overall cost of capital for revenue adequacy purposes. A rate of return equal to this cost of capital shall be a point of reference in determining an adequate revenue level for the Nation's railroads. Other indicators, as previously described, will also be considered. Appropriate findings will be made, as set forth in the regulations contained in the attached notice.

Finally, although our conclusions are well within the subject matter of the notice of rulemaking, we recognize that they extend significantly beyond the specific proposals made in that notice for the purpose of stimulating comment. Petitions for reconsideration of this order will be entertained and given careful consideration. Moreover, as contemplated in section 15a(4), future revisions and refinements of the adopted standards and procedures will be made as experience is gained and improved techniques become available.

FINDINGS

We find that Part 1109 of Chapter X of the Code of Federal Regulations should be amended as set forth in the notice attached to this report. We further find that future proceedings may be conducted in this matter as necessary to revise and maintain the adopted standards and procedures pursuant to the provisions of section 15a(4) of the act.

COMMISSIONER MURPHY, concurring:

Several aspects of the majority's decision raise serious questions which are largely unresolved.

The majority would establish a pattern by which revenue adequacy on a consolidated, district and individual basis would be established in a proceeding handled on an expedited basis within a period of 6 months. Whether the Commission has the resources for such an undertaking is left unanswered. Obviously, it would a major task. Notwithstanding that obstacle, there is the question of the effect of such yearly decisions on general revenue and individual rate proceedings. I am in record with the majority's view that the railroads should move from an almost sole reliance on general rate increases as a method for meeting their revenue needs to individual rate proposals. However, if the yearly revenue adequacy proceeding is to be used as a prima facie basis in any such separate rate proceedings, then I fear that the interests of the small unsophisticated shipper will be largely unprotected. In docket No. 34013, *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298, the Commission although initially proposing that various cost formulas be given prima facie validity ultimately rejected that approach as unsuitable because, among other factors, such an approach would stagnate the science of transportation costing. The same principle appears to be applicable to the proposed determination of revenue adequacy in a separate proceeding. Moreover, since the small shipper would generally be unrepresented in such a separate revenue adequacy proceeding, it would be unfair to deny that shipper the opportunity to challenge the determined level of a return on investment in a subsequent general or individual rate proceeding.

Turning to other questionable matters, the majority would favor the use of costs of construction (cost of work in progress) in the rate base over the allowance of interest on funds used for such construction. While there may be individual instances where the costs of construction approach would be appropriate, i.e., the establishment of an entirely new service for a specific shipper, in general the present ratepayer (shipper) would not be saddled with the costs of facilities which may never accrue to his benefit or may be actually added to the railroad's daily service only at some distant future date. Cf., the distinction between long-term and short-term debt in accounting practices.

The majority hesitates in adopting any meaningful standards as to efficiency. But a start must be made sometime. Why not now? Data furnished by some railroads to the public indicate that railroads do in many instances rely on measurements of efficiency for internal controls. Perhaps one measure which could be immediately implemented without difficulty is the bad-order ratio as a measure of efficiency.

In summary, while I applaud the majority's efforts in seeking to meet the challenges under Public Law 94-210, section 205, its decision leaves unanswered many troublesome areas.

It is ordered:

(1) That the attached notice is incorporated by reference into this report and order.

(2) That part 1109 of Chaptex X of Title 49 of the Code of Federal Regulations is hereby amended by adding a new section 1109.25 as set forth in the attached notice.

(3) That this report and order shall become effective on February 5, 1978.

(4) That notice of this report and order shall be given to the general public by depositing a copy of it and of the attached notice in the Office of the Secretary of this Commission at Washington, D.C., and by delivery of a copy of the notice to the Director, Office of the Federal Register, for publication in the Federal Register.

APPENDIX A

Notice of proposed rulemaking (published March 16, 1977)

INTERSTATE COMMERCE COMMISSION

[49 CFR PART 1109]

[EX PARTE NO. 338]

ESTABLISHMENT OF ADEQUATE RAILROAD REVENUE LEVELS

STANDARDS AND PROCEDURES

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission proposes to make a determination of revenue adequacy, using specified criteria, in any railroad general rate increase proceeding where an improvement of earnings is sought. This proposal is made to implement a provision of the Railroad Revitalization and Regulatory Reform Act of 1976.

DATES: Statements of participants are due on or before the following dates:

Notices of intent to participate -----	March 21, 1977
Statements of comment ----------------	April 25, 1977
Replies to statements of comment -	May 20, 1977

The proposed effective date of the subject rules is February 1, 1978.

ADDRESS: Notices of intent to participate, statements of comment, and replies shall be sent to the Office of Proceedings, Room 5342, Interstate Commerce Commission, Washington, D.C. 20423.

FOR FURTHER INFORMATION CONTACT: Deputy Director or Assistant Deputy Director, Section of Rates, Office of Proceedings, Interstate Commerce Commission, Washington, D.C. 20423 (202-275-7693).

SUPPLEMENTARY INFORMATION: The present section 15a(4) of the Interstate Commerce Act (49 U.S.C. 15a(4)) was enacted on February 5, 1976, by section 205(2) of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act": Public Law 94-210, 90 Stat. 41). As pertinent, it provides that:

> With respect to common carriers by railroad, the Commission shall, within 24 months after the date of enactment of this paragraph, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation, and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels.

Under the authority of section 15a(4), this rulemaking proceeding is instituted for the purpose of developing and promulgating (and thereafter revising and maintaining) reasonable standards and procedures for the establishment of adequate railroad revenue levels.

It is our proposal herein to add a new section 1109.25 to Title 49 of the Code of Federal Regulations, to include essentially the following provisions: In any railroad general rate increase proceeding aimed at improving the carriers' earnings, the adequacy of revenues at the proposed rate level shall be determined. Such determination shall be in accordance with the criteria stated in section 15a(4), and shall be based upon consideration of whether such revenues (1) provide a return on net investment equal to the carriers' cost of capital, (2) enable the maintenance of

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financial ratios indicative of a sound financial condition, and (3) provide a flow of funds sufficient to allow the carriers' needs for funds to be met. The carriers' cost of capital, their return on net investment and other financial ratios, and the sufficiency of their flow of funds shall be determined upon joint consideration of (1) evidence submitted by the parties pursuant to regulations already prescribed, and (2) projections made by the Commission, employing the methodology initially developed in Ex Parte No. 271, *Net Investment—Railroad Rate Base & Rate of Return*, 345 I.C.C. 1492.[1]

It is clear that section 15a(4) calls for a thorough analysis of railroad revenue requirements in determining adequacy of revenues. Railroad general rate increase proceedings provide a logical setting for making such an analysis.

These proceedings afford an ample record for determining revenue adequacy. Under recently prescribed regulations, the carrier respondents in such proceedings are required to submit:

(1) financial ratios and underlying data for essentially the 3 years preceding the rate proposal;

(2) income statement data (a) for the previous four-quarter period as actually reported, and (b) for the previous four-quarter period, restated to reflect current wage, price and productivity levels, with and without the proposed increase;

(3) funds flow statements (statements of changes in financial position) for each of the preceding 3 calendar years; and

(4) other data, including information on rents payable; payments to affiliates for services; costs and revenues for specified commodity groups; uneven effects of the proposed increase by commodities, localities, types of traffic, and individual carriers; and number of employees, service hours, compensation, employee benefits and labor productivity.

These regulations provide that the restated income statement data should enable the Commission to find that the proposed increase:

(a) is cost justified and does not reflect future inflationary expectations;

(b) takes into account expected and reasonable productivity gains;

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[1] The purposes of the present proceeding overlap those of Ex Parte No. 271, which was under way at the time of enactment of the 4R Act. In Ex Parte No. 271, the Commission undertook to consider questions pertaining to the computation of railroad return on investment for ratemaking purposes, and related matters. A substantial record was compiled in that proceeding, and the findings and recommendations of the Coordinator, Commissioner Hardin, were set forth in a report served December 22, 1976 (345 I.C.C. 1492).

Because of time limits on pending proceedings imposed by section 303(b) of the 4R Act (Public Law 94-210, 90 Stat. 40 (49 U.S.C. 17(14)), and in the view of the institution of the present proceeding, the Commission does not contemplate the issuance of a further report in Ex Parte No. 271. However, to the extent that the issues addressed in Ex Parte No. 271 are pertinent to the implementation of section 15a(4), consideration will be given in the present proceeding to the record in Ex Parte No. 271, to the Coordinator's findings and recommendations, [illegible] to any exceptions or comments submitted thereon.

(c) is not excessive in terms of the carriers' ability to provide adequate and safe service or to provide for necessary expansion to meet future requirements for transportation services; and

(d) is not excessive in terms of the rate of return needed by the carriers to attract debt and equity capital at reasonable costs.

Finally, these regulations require the carriers to submit such evidence as will permit a determination of their cost of debt and equity capital, and of the respective amounts of such capital which they need to attract in order to insure their financial stability and capacity to render service.

These requirements were prescribed in Ex Parte No. 290, *Procedures Governing Rail General Increase Proc.*, 351 I.C.C. 544 (1976), as modified February 4, 1977, and are codified at 49 CFR 1102. They are to become effective January 1, 1978.

The evidentiary base provided for general rate increase proceedings by Ex Parte No. 290 may be supplemented by Commission projections of carrier financial data. The initial methodology for making such projections was developed under the supervision of Commissioner Hardin, Coordinator, and is set forth in his report in Ex Parte No. 271, *supra.*

The projected data include income statements, balance sheets, funds flow statements, and financial ratios, for the class I railroads by district and nationwide (excluding, initially, the bankrupt railroads). The projections are to be based on estimates of traffic levels and other data, using, among other things, published econometric forecasts of the general level of economic activity. Initial projections for the years 1976 through 1985 are set forth in the Coordinator's report. We propose to rely both upon the evidentiary requirements of Ex Parte No. 290 and upon projection methodology of Ex Parte No. 271 (including the short-term methodology described at 351 I.C.C. 1936-1942), in making determinations of revenue adequacy.

We do not propose to make revenue-adequacy determinations in all general increase proceedings. As is commonly recognized, the stringent competitive environment in which the railroads operate is frequently a severe limiting factor on the size of the rate increases that the carriers can even hope to implement. For this reason, many of the general increase proposals that have actually been made in recent years have been no greater, and sometimes less, than the amount of the expense increases shown by the carriers as occurring since the previous general rate proceeding. It has been contended for several years that railroad earnings have been below an adequate level. However, where it has appeared that the level of earnings would not be improved by a particular increase proposal, there has been no need for a detailed analysis of the magnitude of the earnings deficiency. Further, because of the necessity for a prompt regulatory response to proposals of this nature, the opportunity for detailed consideration of earnings requirements has been limited.

Where the carriers are content to rest their case for a proposed increase on the need to recoup expense increases, it appears sufficient to evaluate the reasonableness of the increase on that basis. Where, however, the carriers recognize that the revenue increase produced by a proposed rate increase may exceed recent expense increases, and they seek to justify the rate at least in part on the basis of a need for improved earnings, then the analysis of revenue adequacy under the section 15a(4) criteria is clearly relevant. Thus, it is in such proceedings that we have proposed to make the revenue-adequacy determination. (As indicated later in this notice, comments will also be requested as to the application of section 15a(4) to proceedings involving specific increases of individual carriers.)

Because the Commission's evidentiary requirements for railroad general increase proceedings require the submission of data for class I carriers only, we have proposed that the revenue-adequacy determination be based on data for the same class of carriers. Moreover, in these cases we do not propose to make determinations for individual carriers within that class. We recognize the importance of considering the financial posture of individual carriers in evaluating all general increase proposals, and we require the submission of individual carrier data, such as financial ratios and historical funds flows, in our existing regulations. However, at the present time, it would be unduly difficult and time-consuming to make a detailed financial analysis and projections for every class I carrier in the course of a general increase proceeding. Further, because individual carriers within a district cannot feasibly maintain rate levels different from those of their competitors, the reasonableness of overall rate levels must be determined primarily on a district and national basis, rather than by individual carriers. Thus, the purposes of these proceedings will be satisfactorily served by the determination of revenue adequacy on a district and national basis. Of course, if it is ultimately determined that section 15a(4) applies also to any category of specific rate increases, determination would be based on revenue adequacy for the individual carrier involved.

Section 15a(4) calls for the determination of revenue adequacy under conditions of "honest, economical, and efficient management." This is a matter that does not appear to be susceptible of precise quantification, but rather involves subjective judgment on the basis of all pertinent data and evidence. The requirement of honest, economical, and efficient management is not a new one under the act, but rather has long been a part of the rule of ratemaking set forth in section 15a(2) (which, as amended by the "4-R Act", no longer applies to the railroads). Accordingly, while this requirement will underlie the entire revenue adequacy determination, it does not form the basis of a separate standard or procedure in the proposed regulation.

In the words of section 15a(4), the adequate revenue level must "cover total operating expenses, including depreciation and obsolescence." The necessity for rail revenues to cover expenses is one that is recognized in all general increase proceedings, whether or not an improvement in earnings is sought. The manner of recording expenses is prescribed in the Commission's Uniform System of Accounts for Railroad Companies (49 CFR 1201). Such expenses are required to be shown in the income statement data specified in Ex Parte No. 290. Thus, the evidentiary standards for showing expenses are well developed, and we propose to employ the same standards in making the revenue-adequacy determination.

Appraising the adequacy of the carriers' rate of return requires first that there be agreement as to the rate base and as to the income category that represents a return on that base. With respect to the rate base, section 15a(4) employs the term, "capital employed in the business." We interpret "the business" as referring to transportation. Indeed, a principal concern in regulating carrier rates is that they be properly remunerative for transportation services. Thus, the proper rate base is one that measures capital employed in transportation. Such a measurement is envisioned in the concept, "net investment in transportation property," which the Commission has long used as a rate base in appraising carrier earnings. Net investment consists of the net original cost of the transportation assets held by the carriers, plus an allowance for working capital. Accordingly, in considering adequacy of revenues under section 15a(4), we propose to use net investment in transportation property as the rate base.

Whether this rate base is distorted because of unrealistic depreciation reserves or for other reasons is a matter that was under consideration in Ex Parte No. 271. We note that, on the basis of special depreciation studies, the Coordinator concluded that the net investment base was reasonably stated.

If "capital employed in the business" refers to transportation property, then a return on such capital must logically be the income produced by the provision of transportation services. Such a concept is best reflected in the accounting category of "net railway operating income" specified in the Commission's Uniform System of Accounts. Net railway operating income is the amount left over from operating revenues after operating expenses, taxes and rents are deducted. It is the figure already used by the Commission in finding return on net investment, and we propose to continue this practice in implementing section 15a(4).

One of the questions addressed in Ex Parte No. 271 was whether the amount of taxes recognized in computing net railway operating income should include deferred taxes, or should be limited to taxes currently paid. Because the resolution of this question will have a bearing on the computation of return on investment for the purposes of section 15a(4), it will be given further consideration in this proceeding.

Evidentiary requirements concerning the showing of return on net investment are already found in the Commission's regulations. For example, the carriers are required to submit financial ratios, including return on net investment, for essentially the 3 years preceding the proposed increase. Another requirement of these regulations is the estimation of the income, including net railway operating income, that would result from the proposed increase, based on a restatement of the data of the previous year at current wage, price and productivity levels. In addition, the Commission's projections using the Ex Parte No. 271 methodology will include projections of return on net investment. Such data should provide a reasonable basis for conclusions as to the return on net investment that would result from a proposed increase.

Consideration of a proper rate of return for railroads was undertaken in Ex Parte No. 271. The Coordinator concluded that, under present circumstances, the railroads should strive to earn a return of from 6 to 10 percent on net investment. That proceeding, however, did not undertake to prescribe a standard for finding a fair return. The formulation of such a standard appears to be called for in the present proceeding.

The modern approach to finding a fair return is the determination of the firm's cost of capital. Ordinarily, the cost of debt capital (an interest rate) and the cost of equity capital (earnings as a percentage of equity) are separately determined. Then, the two are weighted together according to the debt/equity structure to find the composite cost of capital as a percentage of the investment. Most of the evidence presented on the rate of return question in Ex Parte No. 271, for example, consisted of studies of the railroads' cost of capital.

The cost-of-capital criterion appears to be fully responsive to the requirements of section 15a(4). A return equal to the cost of capital would allow the carriers to meet their interest obligations, and give them the level of earnings required by shareholders. Thus, it should protect their credit in the debt and equity markets, and enable them to retain and attract the capital they need. Accordingly, we propose to employ cost of capital as the standard for a "fair, reasonable, and economic profit or return" for the purposes of section 15a(4).

Evidence concerning the carriers' cost of capital is already required by the Commission's prescribed regulations for railroad general increase proceedings. The nature of the required evidence is not specified in the regulations, and we do not propose at this time to prescribe one particular technique for showing cost of capital. Cost of capital studies can be made in a variety of ways. If based on valid assumptions, the various methods should provide fairly similar results, and can serve as useful checks upon one another. Thus, we contemplate that the parties would be allowed the freedom to show the carriers' cost of capital in the ways they deemed most suitable under conditions prevailing at the time of a particular proceeding. However, we desire the comments of the participants to this proceeding as to whether they believe a particular technique for showing cost of capital should be prescribed, and as to the details of the technique, if any, that they believe should be adopted.

Section 15a(4) does not envision that the rate of return will be the sole factor to be considered in judging revenue adequacy. Rather, it specifies that adequate revenues must provide a "flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation." In addition, the revenue level, to be adequate, must "insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States."

The fact that section 15a(4) contemplates something in addition to rate of return analysis is confirmed by its legislative history. In reporting on a provision in S. 2718 similar to the present section 15a(4), the Senate Committee on Commerce stated:

> In considering adequate revenue levels, the Commission will be expected to utilize the most modern financial analysis techniques available and to adopt a prospective view of carrier revenue needs. Previous analyses of the adequacy of regulated industry revenues has focused upon adequate returns on investments. While this type of analysis may need to be continued, it is equally important for the Commission to focus on the level of revenue needed to provide and maintain adequate service in the public interest. This requires emphasis upon present and future revenue levels under honest, economic, and efficient management as opposed to a theoretically adequate rate of return on investment that may have no relationship to the need for operating and capital funds necessary to maintain service in the public interest. (Senate Report No. 94-499: Report of the Senate Committee on Commerce on S. 2718, Rail Services Act of 1975, November 26, 1975, pages 51-52.)

The Committee's call for a "prospective view of carrier revenue needs" finds a ready response in the projection methodology of Ex Parte No. 271. Further, in that proceeding, as well as in Ex Parte No. 290, the groundwork has been laid for a proper use of the "most modern financial analysis techniques," specifically, analysis of financial ratios and analysis of funds flows. We will discuss how the use of these techniques appears to meet the requirements of section 15a(4).

Return on net investment is itself a financial ratio, and may be used to illustrate the analysis of financial ratios. Like other financial ratios, return on net investment relates one item of financial data to another. In particular, it relates an item from the income statement (net railway operating income) to an item based on the balance sheet (net investment in transportation property). The value of this ratio is that it tells how profitably the transportation property is being used. Thus, ratio figure can be used for comparisons of various types, such as those among carriers or among districts, as well as comparisons between railroads and other industries. It can also be used for comparisons between years for a particular carrier or group of carriers. Such comparisons are a means for testing how well the carriers are performing at a particular time, and whether their performance is improving or declining with the passage of time.

However, return on net investment is only one of a number of financial ratios that can be used in making judgments about various aspects of the carriers' financial performance. Relationships between a number of items in the income statement and balance sheet can be examined, to permit judgments as to operating efficiency, liquidity, ability to meet debt obligations, and other matters. Further discussion of such uses may be found in the Coordinator's report in Ex Parte No. 271, 345 I.C.C. 1492 at 1932-1936.

Financial ratios can be of value in making judgments as to the soundness of the carriers' financial condition at a particular revenue level, and as to the attractiveness of their debt and equity securities in the capital markets. Thus, analysis of such ratios can assist in the determination required by section 15a(4) as to whether a proposed rate level would "insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States."

An approach that could be taken in this proceeding would be the prescription of particular numbers for various ratios that would be taken as indicators of revenue adequacy. However, we have doubts as to the validity of such a mechanical approach. It appears preferable to us at this time to simply recognize the importance of considering financial ratios in determining adequacy of revenues, and to allow the ratios shown in particular proceedings to be appraised according to the informed judgments of the parties and the Commission. Thus, we do not propose any particular numerical ratios as tests of adequate revenues. However, we do propose that one measure of revenue adequacy for the purposes of section 15a(4) be whether such revenues make possible a satisfactory financial condition, as reflected by analysis of financial ratios.

In our evidentiary regulations for railroad general increase proceedings, we require evidence of selected carrier financial ratios for the 3 years preceding a proposed general increase. In addition, the projection methodology in Ex Parte No. 271 embarces the projection of financial ratios, as a concomitant of the projections of income statements and balance sheets. Such data will afford the needed evidentiary basis for the use of financial ratios in the determination of revenue adequacy. Accordingly, we propose no additional evidentiary requirements with respect to financial ratios at this time.

The other factor proposed to be considered in the evaluation of revenue adequacy is the sufficiency of the carriers' flow of funds. A statement of funds flow permits a broader view of railroad financial requirements than is provided within the confines of the income statement. The focus of the income statement is on revenues obtained from the use of carrier property, and on the expenses incurred in obtaining those revenues. The income statement recognizes the movement of money from shippers to carriers, and the payment of some of that money to providers of labor, material, and supplies. However, carrier operations also involve other movements of funds. Such transactions have to do chiefly with the acquisition of property, or capital goods, with which to provide service, and with the financing of such property. They concern primarily the movement of funds between carriers and shareholders, between carriers and lenders, and between carriers and suppliers of capital goods.

A list of the sources of carrier funds and a balancing list of the uses of such funds is a statement of funds flow. The study of such a statement can aid in the determination of adequate revenue levels, by revealing the extent to which the carriers are succeeding in obtaining the funds they need to meet their requirements for funds.

The carriers' requirements for funds arise from several causes. The criteria stated in section 15a(4) relate to these causes. First is the need for capital spending, in the acquisition of transportation property. The carriers must have sufficient funds to replace needed assets as they become unusable through exhaustion or obsolescence, and to expand their plant when necessary to provide needed service. In the words of section 15a(4), they must have sufficient funds to "support prudent capital outlays."

In addition, the carriers must be able to repay their debt obligations as they become due. Section 15a(4) refers to this aspect as the necessity for having sufficient funds to "assure the repayment of a reasonable level of debt."

Third, the carriers must be able to provide the necessary reward to shareholders, through a combination of dividend payments and increases in shareholders' equity from retained earnings. If the carriers do not have sufficient funds for this purpose, they cannot hope to market additional stock on reasonable terms. This is recognized in section 15a(4) as the need for sufficient funds to "permit the raising of needed equity capital."

Inflation is also a factor in the carriers' needs for funds. In particular, it affects the amount needed for capital expenditures, by requiring increases in the dollar investment just to maintain the same real value. It also affects the amount of earnings required by shareholders to offset the decline in the real value of their equity. If the carriers have sufficient funds to meet their needs at inflated dollar costs, then they will have sufficient funds, in the words of section 15a(4) to "cover the effects of inflation."

As indicated by section 15a(4), the carriers' "flow of net income plus depreciation" must be sufficient to allow their needs for funds to be met. We do not construe this language to mean that all of the needed funds must be provided directly from the flow of net income plus depreciation. As we have previously found, not all of the carriers' requirements for capital expenditures can be expected to be met from funds provided by ratepayers. Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 180-181 (1971); Ex Parte No. 295, *Increased Freight Rates and Charges, 1973*, 344 I.C.C. 589, 610 (1973); Ex Parte No. 318, *Increased Freight Rates and Charges—1976*, 355 I.C.C. 254 (1976), slip opinion, pp. 29-30. There must be a resort to the other sources of capital as well. However, the amounts of funds that the carriers can hope to raise in the capital markets depends on the quality of their credit in those markets. The quality of their credit, in turn, depends on the adequacy of their earnings. Thus, while the flow of net income plus depreciation is not expected to cover all needs for funds directly, it must be sufficient to allow those needs to be met, giving consideration to the carriers' credit in the capital markets.

By examining the carriers' rates of return and other financial ratios, the Commission can estimate the carriers' credit in the capital markets, and draw conclusions as to the amounts of debt and equity capital that they could expect to raise. By considering these data, together with estimates of funds requirements and of the amounts of net income and depreciation expected at the proposed rate level, the Commission can determine whether the carriers will have sufficient funds to meet their requirements for funds at the proposed rate level.

The determination of the amount of funds required by the carriers at a particular time, as well as the determination of the amount of funds available from capital sources, are matters requiring judgment based on all the facts existing at a particular time. Thus, we have not proposed particular standards for such determinations, other than to say that the criteria of section 15a(4) will govern, and that an adequate revenue level is one that will provide a sufficient flow of funds to allow the carriers' needs for funds to be met.

With respect to evidentiary requirements, our regulations provide that the carriers shall submit funds flow statements (statements of changes in financial position) for the 3 years preceding the proposed increase. In addition, the carriers are required to show the amounts of capital needed in order to assure their financial stability and their capacity to render service.

The computerized projection methodology of Ex Parte No. 271 is being developed with the primary purpose of forecasting funds flow. This methodology relies on forecasts of traffic levels and other pertinent data to anticipate what the railroads' funds requirements will be for each of the succeeding 10 years. Thus, it will permit an estimate of the extent to which the carriers' foreseeable funds requirements may exceed the funds available from operations and capital sources.

We do not propose additional evidentiary requirements with respect to funds flow at this time, although this is a matter for further consideration after receipt of comments. Rather, we propose that the sufficiency of the carriers' flow of funds at the proposed rate level shall be determined upon joint consideration of the evidence required by our prescribed regulations and projections of funds flow using the methodology of Ex Parte No. 271.

We recognize that interested persons may already have given substantial attention to section 15a(4), and may have formulated their own proposals as to how it should be implemented. Our purpose in proposing a specific rule at this time is not, by any means, to foreclose consideration of such proposals, but merely to afford a useful basis for comment. In particular, we hope to stimulate consideration of how any new standards and procedures would mesh with the Commission's existing machinery for handling railroad general increase proceedings.

All interested persons are invited to submit their comments (including data, views and arguments) as to the regulation proposed herein, and as to any amplification or modification of that regulation that they consider desirable. Comments are also desired as to the following questions:

1. Should other financial indicators, such as projected return on shareholders' equity, be accorded the same or greater weight than rate of return on investment?
2. Should standards and procedures be prescribed for determining the adequacy of overall revenues for carriers involved in proceedings concerning individual rates?

In addition, comments are desired on the projection methodology of Ex Parte No. 271, and will be seriously considered for the purpose of modifying and refining that methodology. In particular, it is noted that the expenditure projections made in Ex Parte No. 271 were based on normalized maintenance, and did not include expenditures needed to make up deferred maintenance. One of the needs for funds that the Commission has recognized in the past in granting general increases is for making up deferred maintenance and delayed capital improvements (see in particular, Ex Parte No. 305, *Nationwide Increase of en Percent in Freight Rates and Charges, 1974*, order served June 4, 1974). We recognize that, besides the data reported to us under Ex Parte No. 305, the carriers have filed data with the Secretary of Transportation under section 504(a) of the 4R Act and that under other provisions of the act the maintenance needs of particular rail lines will come under study for considerations of public funding. We are aware of problems of definition and of lack of uniformity in measurement. Comments are desired as to whether deferred maintenance and delayed capital improvements should be included in the projection methodology, and as to how they should be defined and determined.

Finally, comments of interested persons are desired as to any regulations or approaches other than those suggested here that they may believe are warranted to provide the standards and procedures called for by section 15a(4). All common carriers by railroad subject to part I of the Interstate Commerce Act are made respondents in this proceeding.

Any interested person may participate in this proceeding by submitting initial or reply statements of comment (or both) in response to this notice. Any person intending to participate shall, on or before March 21, 1977, file an original and one copy of a notice of intent to participate with the Office of Proceedings, Room 5342, Interstate Commerce Commission, Washington, D.C. 20423. Because the Commission desires to conserve time, to avoid unnecessary expense, and to limit the service of statements in this proceeding to persons who intend actively to participate, each notice of intent to participate shall include a detailed statement of (1) whether the person's interest extends merely to receiving Commission releases in this proceeding; (2) whether the person wishes to participate by filing and receiving statements of comment; (3) whether, if the person desires to file statements, his interests can be consolidated with those of other persons by the filing of joint statements; and (4) any other pertinent information to aid in limiting the service list to be issued in this proceeding. The Commission will prepare and make available, to all persons submitting notices of intent to participate, a service list which will contain the names and addresses of all persons participating in this proceeding.

An original and 19 copies of each statement of comment, if possible, shall be filed with the Commission, and 1 copy of each statement shall be served upon each person on the service list, on or before April 25, 1977. Replies to statements of comment shall be similarly filed and served on or before May 20, 1977. No oral hearing is contemplated at this time.

Notice of the institution of this rulemaking proceeding will be given to the general public by depositing a copy of this notice in the Office of the Secretary of the Commission for public inspection and by filing a copy of the notice with the Director, Office of the Federal Register, for publication in the Federal Register.

This is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Accordingly, it is proposed that 49 CFR 1109 be amended by adding a new section 1109.25 as follows:

§1109.25 Standards and procedures for the establishment of adequate railroad revenue levels.

In any proceeding where a proposed general increase in railroad rates is sought to be justified, in whole or in part, on the basis of a need for a higher level of carrier earnings (i.e., where the increase is recognized as being greater than the amount necessary to offset expense increases occurring since the carriers' last previous general rate increase), the adequacy of revenues at the proposed rate level shall be determined by the Commission. Such determination shall be made, by district and on a national basis, for the class I railroads.

(a) The determination of the adequacy of revenues at the proposed rate level shall be governed by the criteria set forth in section 15a(4) of the Interstate Commerce Act (49 U.S.C. 15a(4)), and shall be based upon consideration of:

(1) Whether such revenues cover total operating expenses (including depreciation and retirements) and provide a return on net investment in transportation property equal to the carriers' cost of capital;

(2) Whether such revenues enable the carriers to maintain financial ratios indicative of a sound financial condition; and

(3) Whether such revenues make possible a sufficient flow of funds to allow the carriers' needs for funds to be met.

(b) Determination of the railroads' cost of capital, their return on net investment and other financial ratios, and the sufficiency of their flow of funds, at the proposed rate level, shall be made upon joint consideration of:

(1) Evidence submitted by the railroads pursuant to the requirements of part 1102 of this chapter;

(2) Other evidence submitted by the parties to the proceeding; and

(3) Projections of income statements, balance sheets, financial ratios and funds flows by the Commission, employing the methodology described in Ex Parte No. 271, *Net Investment—Railroad Rate Base & Rate of Return*, 345 I.C.C. 1492, and such modifications of that methodology as may from time to time be adopted by the Commission. (Sec. 205, Public Law 94-210, 90 Stat. 41 (49 U.S.C. 15a(4))

NOTICE

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - PRACTICE AND PROCEDURE
PART 1109 - REQUIREMENTS AND PROCEDURES RELATING TO RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

EX PARTE NO. 338

STANDARDS AND PROCEDURES FOR THE ESTABLISHMENT OF ADEQUATE RAILROAD REVENUE LEVELS

AGENCY: Interstate Commerce Commission

ACTION: Final rule.

SUMMARY: The adopted regulation sets forth standards and procedures to be followed by the Commission in determining the adequacy of railroad revenues and in assisting the railroads to attain adequate revenues.

EFFECTIVE DATE: February 5, 1978.

FOR FURTHER INFORMATION CONTACT: Janice M. Rosenak, Deputy Director, or Harvey Gobetz, Assistant Deputy Director, Section of Rates, Office of Proceedings, Interstate Commerce Commission, Washington, D.C. 20423 (202-275-7693 or 202-275-7656).

SUPPLEMENTARY INFORMATION

This proceeding was instituted to implement section 15a(4) of the Interstate Commerce Act (49 U.S.C. 15a(4)). That section was enacted by section 205(2) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210, 90 Stat. 41). As pertinent, it provides that:

> With respect to common carriers by railroad, the Commission shall, within 24 months after the date of enactment of this paragraph, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation, and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels.

Notice of the insitution of this proceeding was published in the Federal Register on March 16, 1977 (42 F.R. 14740).

Comments from interested parties have been received and considered, and the Commission has issued a report and order adopting a final regulation. The regulation provides that a proceeding shall be conducted each year to determine revenue adequacy for the Nation's railroads individually and on a composite basis. It further provides that adequacy of revenue will be a factor considered both in general rate increase proceedings and in individual rate proceedings. The regulation, effective February 5, 1978, is set forth below.

Issued at Washington, D.C., January 31, 1977.

Accordingly, 49 CFR 1109 is amended by adding a new section 1109.25 as follows:

§1109.25 Standards and procedures for the establishment of adequate railroad revenue levels.

In order to assist the Nation's railroads in attaining adequate revenue levels, within the meaning of section 15a(4) of the Interstate Commerce Act (49 U.S.C. 15a(4)), the Commission will observe the following standards and procedures.

(a) Standards

(1) The revenue adequacy of the Nation's railroads on a composite level shall be judged in accordance with the criteria of section 15a(4) and upon consideration of all pertinent financial indicators, including a rate of return on net investment equal to the cost of capital, other financial ratios, and the flow of funds.

(2) The revenue adequacy of an individual carrier shall be determined in accordance with the criteria of section 15a(4), upon consideration of all pertinent financial indicators and other evidence as to ability to make needed investment.

(3) The need for revenue adequacy will be taken into account and regarded as a highly important factor both in general rate increase proceedings and in individual rate proceedings.

(b) Procedures. Each year, the Commission shall make a determination of revenue adequacy for the class I railroads as a national composite, as a district composite, and individually, according to the following procedures:

(1) On or before April 30 of each year, the Commission shall issue a notice and order, with a concurrent press release, announcing that a revenue adequacy proceeding is to be conducted. The notice and order shall make the Nation's class I railroads respondents in the proceeding, and shall provide for the submission by interested persons of notices of intent to participate. The notice shall be published in the Federal Register.

(2) By May 31 of each year, the Commission shall issue a list of all persons who have indicated an intent to participate, and shall serve the list on the railroads and on all listed participants. Each of the filings and issuances set forth in the following paragraphs of this subsection (b) shall be served on the railroads and on each listed participant.

(3) On or before June 30 of each year, the Commission shall publish a funds flow projection for comment by participants.

(4) By June 30 of each year, all class I railroads individually and jointly as appropriate, shall file verified statements containing data consistent with the following requirements. For the purposes of this rule, the revenue requirements used to determine whether a carrier is a class I line-haul railroad, will include only freight service revenues.

(A) Schedules A, I, and J, as set forth and explained at the end of this section. In addition, data on transactions with affiliates shall be submitted as follows: each railroad shall submit details of transactions with its parent, subsidiary, or affiliated companies in each of the last 3 calendar years as follows: (a) advances, whether in cash or property; (b) encumbrances of railroad assets or the assets of a parent, and affiliate, or subsidiary for noncarrier purposes; and (c) any other monetary or property transactions, including the payment and receipt of dividends. Normal transactions, such as interline settlements, and any other considered necessary to and normally considered in the course of railroad business, need not be reported for the purpose of this particular section. After the initial submission of data based on the preceding 3 calendar years, the carriers are required only to report data based on the immediately preceding calendar year.

(B) A cost of capital study sufficient to support the findings described in paragraph (7)(C) below;

(C) A fair rate of return analysis on a national basis;

(D) A statement of adequate revenue levels based on (1) traffic volume and expenses in the prior calendar year, and (2) estimated traffic volume and expenses for the current year;

(E) Evidence of each carrier's most recent bond ratings and, in the initial submission, of ratings during the preceding 3 calendar years; and

(F) Such other evidence as they desire to present pertaining to the standards set forth in this regulation. All underlying data used in preparation of the material outlined above shall be made available for inspection upon reasonable request in writing, and shall be furnished by the railroads to the Commission upon request. Official notice will be taken of all the railroads' annual and quarterly reports on file with the Commission.

(5) By July 30 of each year, other intersted parties may file reply statements, including evidence and arguments pertinent to the standards set forth in this regulation, and their comments, if any, on the Commission's funds flow projections.

(6) By August 20 of each year, rebuttal to the reply statements may be filed by the railroads, including their comments, if any, on the Commission's funds flow projections.

(7) By October 30 of each year, the Commission will issue a reporting setting forth the following findings:

(A) An adequate revenue level for the Nation's railroads as a whole and for each of the three districts, stated as a percentage return on net investment.

(B) A determination (with explanation) for each class I railroad as to whether its existing revenue is adequate or inadequate.

(C) A determination of the following cost of capital items:

(i) the cost of embedded debt for each class I railroad, and for the district and national composite.

(ii) the cost of new debt for a selected group of railroads.

(iii) the cost of equity capital based on market value studies of a selected group of railroads.

(iv) the cost of equity capital indicated by studies of comparable earnings.

Carrier: ______________
District: ______________
Nationwide: [ ]

SCHEDULE A

Selected financial data (dollars in thousands)

Line No.	Item (a)	Source[1] (b)	Calendar Yr. 19 (c)	Calendar Yr. 19 (d)	Calendar Yr. 19 (e)
1.	Net income	A.R. Sch. 300			
2.	Depreciation and retirements-road	A.R. Sch. 322, Total Depr. & Retire. Cols			
3.	Depreciation and retirements-equipment	A.R. Sch. 330, Total Depr. & Retire. Cols			
4.	Long-term debt due within 1 year	A.R. Sch. 200, Acct. 764			
5.	Long-term debt due after 1 year	A.R. Sch. 200, Total of Accts. 765, 767, 766, 766.5, 768, 769, 770.1 & 770.2.			
6.	Long-term debt due after 1 year[2]	See L. 5			
7.	Income available for fixed charges	A.R. Sch. 300			
8.	Fixed and contingent charges	A.R. Sch. 300, Add Accts. 546, 547 & 548			
9.	Railway operating expenses	A.R. Sch. 300, Acct. 531			
10.	Railway operating revenues	A.R. Sch. 300, Acct. 501			
11.	Net railway operating income	A.R. Sch. 300, footnote			
12.	Provision for deferred taxes	A.R. Sch. 300, Acct. 557			
13.	Equity in earnings (losses) of affiliated companies	A.R. Sch. 300, Income from affiliated Cos			
14.	Total current assets	A.R. Sch. 200, Total current assets			
15.	Total current liabilities	A.R. Sch. 200, Total current liabilities			
16.	Shareholders' equity	A.R. Sch. 200, Total (net) stockholders' equity			
17.	Shareholders' equity[2]	See L. 16			
18.	Cash dividends paid	A.R. Sch. 305, Acct. 623			

See footnotes at end of table.

BEST DOCUMENT AVAILABLE

Carrier: ____________
District: ____________
Nationwide: [ ]

Selected financial data (dollars in thousands)—Continued

Line No.	Item (a)	Source[1] (b)	Calendar Yr. 19 (c)	Calendar Yr. 19 (d)	Calendar Yr. 19 (e)
19.	Interest expense, amortization of discount on funded debt, contingent interest and release of premiums on funded debt.	A.R. Sch. 300, Accts 546 (int. exp.) + 547 + 548 + 546 (contingent interest) - 517.			
20.	Net investment in railroad property	(A.R. Sch. 200, Accts. 701 + 712) + (Sch. 211 N-1, Line 39, col. (d) minus col. (e)).			
21	Do[2]	See L. 20			
22.	Current ratio	L. 14 ÷ L. 15			
23.	Dividend pay-out ratio	L. 18 ÷ L. 1			
24.	Rate of return on net investment in railroad property.	L. 11 ÷ L. 21			
25.	Rate or return on shareholders' equity	L. 1 ÷ L. 17			
26.	Cash flow	Ls. 1 thru 3 + 12 - L. 13			
27.	Throw-off to debt ratio, current maturities	L. 26 ÷ L. 4			
28.	Capital structure ratio	L. 5 ÷ L. 5 + L. 16			
29.	Rate of return on total capitalization	L. 1 + L. 19 ÷ L. 6 + L. 17			
30.	Fixed and contingent charge coverage (times)	L. 7 ÷ L. 8			
31.	Ratio ry. operating expenses (includes net rents) to ry. operating revenue.	L. 9 ÷ L. 10			

---

[1] Annual report sources refer to 1978 proposed Annual Report Form R-1. For years subsequent to 1978, use the comparable annual report sources. For years prior to 1978, see Conversion Table for Schedule A.

[2] Show average of beginning and end-of-year figure.

[3] Show average of beginning and end-of-year figure. Annual Report Sch. 211N provides yearend data only. Refer to prior annual reports for comparable beginning-of-year data.

Purpose:

The purpose of schedule A is to ascertain the financial posture of the individual railroads and groups of railroads by the analysis of certain key financial data with a view to determining future revenue needs.

Instructions:

Schedule A should report financial data for class I carriers only. A separate schedule A must be prepared for the following:

(1) each individual carrier I carrier
(2) composite district class I carriers
(3) composite nationwide class I carriers, if appropriate.

Each separate schedule A outlined above must be submitted on two different bases. The first requires that all of the data reported in schedule A include the effects of the Commission's January 1, 1974, accounting rules changes. Under this basis, a restatement of data for all periods prior to January 1, 1974, is necessary. The second basis requires that all of the data reported in schedule A exclude the effects of the January 1, 1974, accounting rules changes. Under this second basis, a restatement of 1974 and later data is necessary.

Time frame requirements:

Column c—The data reported in column c should be based on the third calendar year preceding the filing of the involved schedule.

Column d—The data reported in column d should be based on the second calendar year preceding the filing of the involved schedule.

Column e—The data reported in column e should be based on the calendar year immediately preceding the filing of the involved schedule.

NOTE: After the initial submission of data for schedule A, the carriers are required to report only column e data.

SCHEDULE I

Statement of changes in financial position (dollars in thousands)

Carrier: ____________________
District: ____________________
Nationwide: [ ]

Line No.	Schedule¹ (a)	Line (b)	Column (c)	Description (d)	Calendar Year 19 __ (e)	Calendar Year 19 __ (f)	Calendar Year 19 __ (g)
				SOURCES OF WORKING CAPITAL			
				Working capital provided by operations:			
1	300	62	(b)	Net income (loss) before extraordinary items			
				Add expenses not requiring outlay of working capital: (subtract) credits not generating working capital:			
2	324	17	(b)	Retirement of nondepreciable property			
3	396	-------	------	Loss (grain) on sale or disposal of tangible property			
4	NOTE A	-----	------	Add depreciation and amortization expenses			
5	300	5	(b)	Net increase (decrease) in deferred income taxes			
6	300	35	(a)	Net decrease (increase) in parent's share of subsidiary's undistributed income for the year			
7	200	74, 77	(b)-(c)	Net increase (decrease) in noncurrent portion of estimated liabilities			
				Other (specify):			
8							
9							
10							
11							
12							
13							
14							
15							

See footnote at end of table.

Statement of changes in financial position (dollars in thousands)—Continued

Carrier: ____________
District: ____________
Nationwide:[ ]

Line No.	Schedule[1] (a)	Line (b)	Column (c)	Description (d)	Calendar Year 19__ (e)	Calendar Year 19__ (f)	Calendar Year 19__ (g)
				SOURCES OF WORKING CAPITAL—Continued			
16							
17							
				Working capital provided by operations (Continued):			
18				Total working capital from operations before extraordinary items			
19	300	68	(b)	Extraordinary items and accounting changes			
				Add expenses not requiring outlay of working capital; (subtract) credits not generating working capital:			
20	300	63	(b)	Loss (gain) on extraordinary items			
21	300	65	(b)	Net increase (decrease) in deferred income taxes			
22	300	67	(b)	Cumulative effect of changes in accounting principles			
				Other (specify):			
23							
24							
25							
26							
27							
28				Total working capital from extraordinary items and accounting changes			
29				Total working capital from operations (lines 18 and 28)			
				Working capital from sources other than operating:			
30	-------	------	------	Proceeds from issuance of long-term liabilities			
31	-------	------	------	Proceeds from sale/disposition of carrier operating property			
32	-------	------	------	Proceeds from sale/disposition of other tangible property			

See footnote at end of table.

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Statement of changes in financial position (dollars in thousands)—Continued

Carrier: ....
District: ....
Nationwide:[ ]

Line No.	Schedule[1] (a)	Line (b)	Column (c)	Description (d)	Calendar Year 19___ (e)	Calendar Year 19___ (f)	Calendar Year 19___ (g)
				SOURCES OF WORKING CAPITAL—Continued			
33	205	99	(l)	Proceeds from sale/repayment of investments advances			
	206	99	(k)				
34	204	41	(f)	Net decrease in sinking and other special funds			
35	229	15	(e)+(f)-(i)	Proceeds from issue of capital stock			
				Other (specify):			
36							
37							
38							
39							
40							
41				Total working capital from sources other than operating			
42				Total sources of working capital (lines 29 and 41)			
				APPLICATION OF WORKING CAPITAL			
43	-------	-------	------	Amount paid to acquire/retire long-term liabilities			
44	305	10	(b)	Cash dividends			
45	211	52	(e)	Purchase price of carrier operating property			
46	-------	-------	------	Purchase price of other tangible property			
47	205	99	(j)	Purchase price of long-term investments and advances			
	206	99	(i)				
48	204	41	(e)	Net increase in sinking or other special funds			
49	229	15	(j)	Purchase price of acquiring treasury stock			
	-------	-------	------	Other (specify):			

See footnote at end of table.

Statement of changes in financial position (dollars in thousands)—Continued

Carrier: ____________

District: ____________

Nationwide:[ ]

Line No.	Schedule[1] (a)	Line (b)	Column (c)	Description (d)	Calendar Year 19__ (e)	Calendar Year 19__ (f)	Calendar Year 19__ (g)
				APPLICATION OF WORKING CAPITAL—Continued			
50							
51							
52							
53							
54							
55				Total application of working capital			
56				Net increase (decrease) in working capital (line 42 less line 55) (show computations in schedule 309S)			

NOTE A: Furnish the actual amount of depreciation and amortization expenses taken during the year. The following can be used as references:

Schedule	Line	Column
322	26	(b)
326	3	(b)
330	9	(b)
214	22	(j)
200	72	(b)-(c)
200	73	(b)-(c)

---

[1] Annual report sources refer to the 1977 Annual Report R-1. For year subsequent or prior to 1977, use comparable annual report sources.

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Purpose:

Schedule I is designed to provide the Commission with an indication of the carriers' sources and uses of funds over the recent past.

Instructions:

Schedule I should report funds flow data for class I carriers only. A separate schedule I must be prepared for the following:

(1) each individual class I carrier
(2) composite district class I carriers
(3) composite nationwide class I carriers, if appropriate.

The term "funds" for the purpose of this schedule shall include all assets or financial resources even though a transaction may not directly affect cash or working capital. For example, the purchase of property in exchange for bonds or shares of stock would be an application of funds for investment in property provided by the issue of securities.

Sources and uses of funds should be individually disclosed. For example, outlays for fixed assets should not be reported net of retirements.

Time fram requirements:

Column e—The data reported in column e should be based on the third calendar year preceding the filing of the involved schedule.

Column f—The data reported in column f should be based on the second calendar year preceding the filing of the involved schedule.

Column g—The data reported in column g should be based on the calendar year immediately preceding the filing of the involved schedule.

NOTE: After the initial submission of data for Schedule I, the carriers are required to report only column g data.

Carrier: ____________________
District: ____________________
Nationwide: [ ]

SCHEDULE J

Composite affiliate charges to respondents for services rendered

Line No.	Nature of service (a)	Calendar Year 19 __ (b)	Calendar Year 19 __ (c)	Calendar Year 19 __ (d)
1	Management services			
2	Legal services			
3	Accounting services			
4	Procurement of materials, supplies, and equipment			
5	Leasing of land and structures			
6	Leasing of equipment			
7	Miscellaneous services			
8	Total charges to respondents			
9	Affiliate revenues derived from services to parties other than respondents			
10	Total affiliate revenues (line 8 and 9)			
11	Total affiliate income from operations before income taxes			

Purpose:

Schedule J is designed to faciliate an assessment of the effect on the carriers' profits of transactions with affiliates.

Instructions:

Schedule J should report affiliate data for class I carriers only. A separate schedule J must be prepared for the following:

(1) each individual class I carrier
(2) composite district class I carriers
(3) composite nationwide class I carriers, if appropriate.

Affiliate transactions aggregating less than $30,000 need not be reported in this schedule.

Time frame requirements (same as schedule A):

Column b—The data reported in column b should be based on the third calendar year preceding the filing of the involved schedule.

Column c—The data reported in column c should be based on the second calendar year preceding the filing of the involved schedule.

Column d—The data reported in column d should be based on the calendar year immediately preceding the filing of the involved schedule.

NOTE: After the initial submission of data for schedule J, the carriers are required to report only column d data.

(Sec. 205, Public Law 94-210, 90 Stat. 41 (49 U.S.C. 15a(4))

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